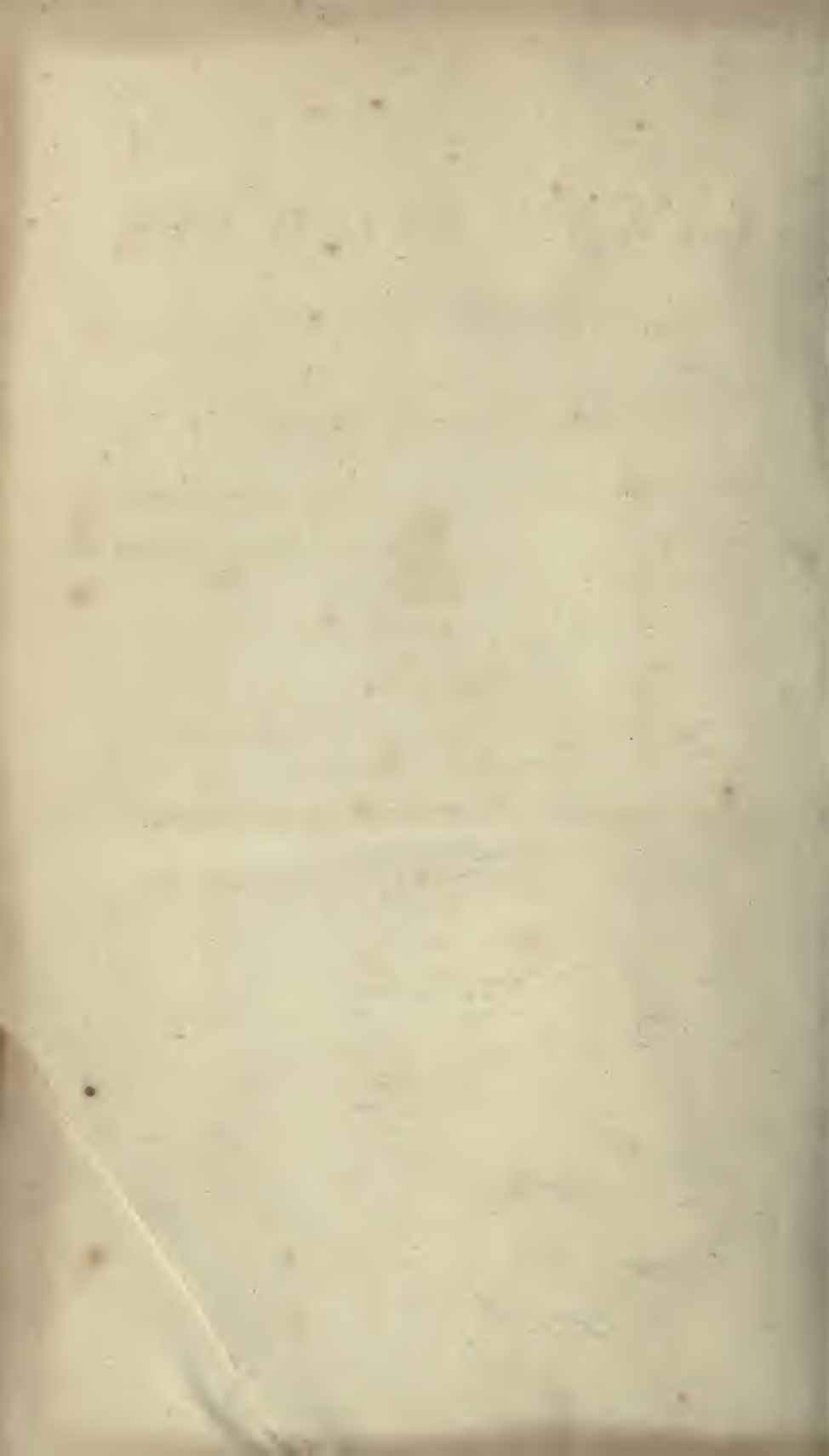


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THE
LAW OF RAILWAYS,
INCLUDING THE
CONSOLIDATION AND OTHER GENERAL ACTS

FOR REGULATING
RAILWAYS IN ENGLAND AND IRELAND,
WITH
COPIOUS NOTES OF DECIDED CASES ON THEIR CONSTRUCTION,
INCLUDING
THE RIGHTS AND LIABILITIES OF SHAREHOLDERS, ALLOTTEES
OF SHARES, AND PROVISIONAL COMMITTEE MEN;
WITH FORMS &c.

BY
LEONARD SHELFORD, ESQ.,
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

FIRST AMERICAN FROM THE THIRD LONDON EDITION,
WITH
COPIOUS NOTES AND REFERENCES TO LATE ENGLISH CASES; AND
AMERICAN STATUTES AND DECISIONS.

BY
MILO L. BENNETT, LL. D.,
ONE OF THE JUDGES OF THE SUPREME COURT OF VERMONT.

IN TWO VOLUMES.
VOL. I.

BURLINGTON:
CHAUNCEY GOODRICH.

1855.

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TO
THE HONORABLE
ISAAC F. REDFIELD, LL.D.,
CHIEF JUSTICE
OF
THE SUPREME COURT OF VERMONT,
AS A TESTIMONIAL
OF THE GREAT RESPECT AND SINCERE AFFECTION
WHICH IS BORNE HIM,
FOR HIS LEARNING, LEGAL ATTAINMENTS, AND EXEMPLARY VIRTUES,
THIS AMERICAN EDITION
OF
SHELFORD ON THE LAW OF RAILWAYS,
IS RESPECTFULLY INSCRIBED, BY
THE EDITOR.

THE
HISTORY OF THE
CITY OF BOSTON
FROM 1630 TO 1880

BY
JOHN H. COLEMAN
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PREFACE.

TO THE FIRST AMERICAN EDITION.

MR. SHELFORD in his admirable treatise on the Law of Railways, has done the profession good service, and all who are called upon to become familiar with the Law upon that important and interesting subject, and daily becoming more so, can not but duly appreciate his labors. It has been the object of the American Editor to introduce into this edition the new matter, that has arisen in England since the 3d edition was prepared for the press by Mr. Shelford, and also the American decisions on this subject, decided upon common principles; and also those giving construction to Railway Charters, Railway Statutes, and cases involving questions of Constitutional Law.

The Editor has sought to embody the substance of the decisions; and as far as practicable, to arrange the new matter under the appropriate heads in the text of the English Edition, so as to give it the appearance of an entire work; and though the new matter, for the sake of greater convenience to the reader, is inserted in the original text, yet it is, in all cases, distinguished from it by numerical references, while

the original text is distinguished by references composed of letters of the alphabet.

That the labors of the Editor have been executed with entire accuracy and without the intervention of errors is hardly to be expected, and he trusts that the liberality of a candid profession will not visit his faults with an undue severity.

The Editor is indebted to the labors of others for the additions to the Index to the English Edition.

BURLINGTON, VT., July 25, 1855.

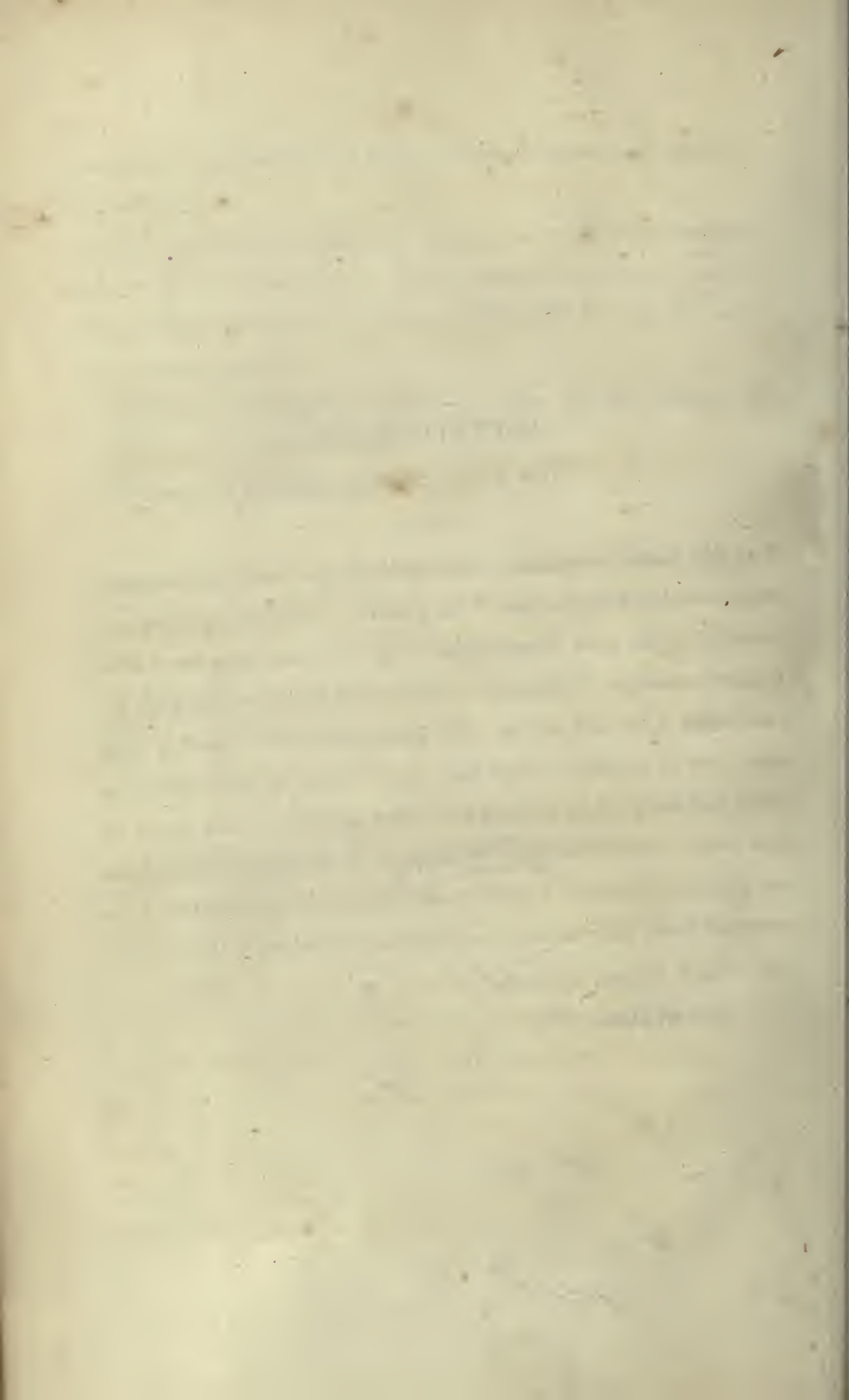
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TO THE THIRD LONDON EDITION.

THE new matter introduced in this edition is extensive and important, comprehending the substance of the numerous Decisions upon the construction of the three Consolidation Acts, 1845, and upon many other subjects relating to Railway Companies which have occurred since the publication of the last edition. The General Statutes respecting Railways now in operation, which have passed since the last edition, are added, and many others referred to. That part of the work which relates to the liabilities incurred by members of Provisional Committees and Allottees of Shares is almost entirely new, in consequence of the numerous cases and extensive modification of the law on that subject.

3, BRICK COURT, TEMPLE,

Easter Term. 1853.



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8 & 9 VICTORIA, C. 18.

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14 & 15 VICTORIA, c. 70.

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[7th August, 1851.]

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Railways Clauses Consolidation Act, 1845.

8 & 9 VICTORIA c. 20.

An Act for consolidating into one Act certain Provisions usually inserted in Acts authorizing the making of Railways.

[8th May, 1845]

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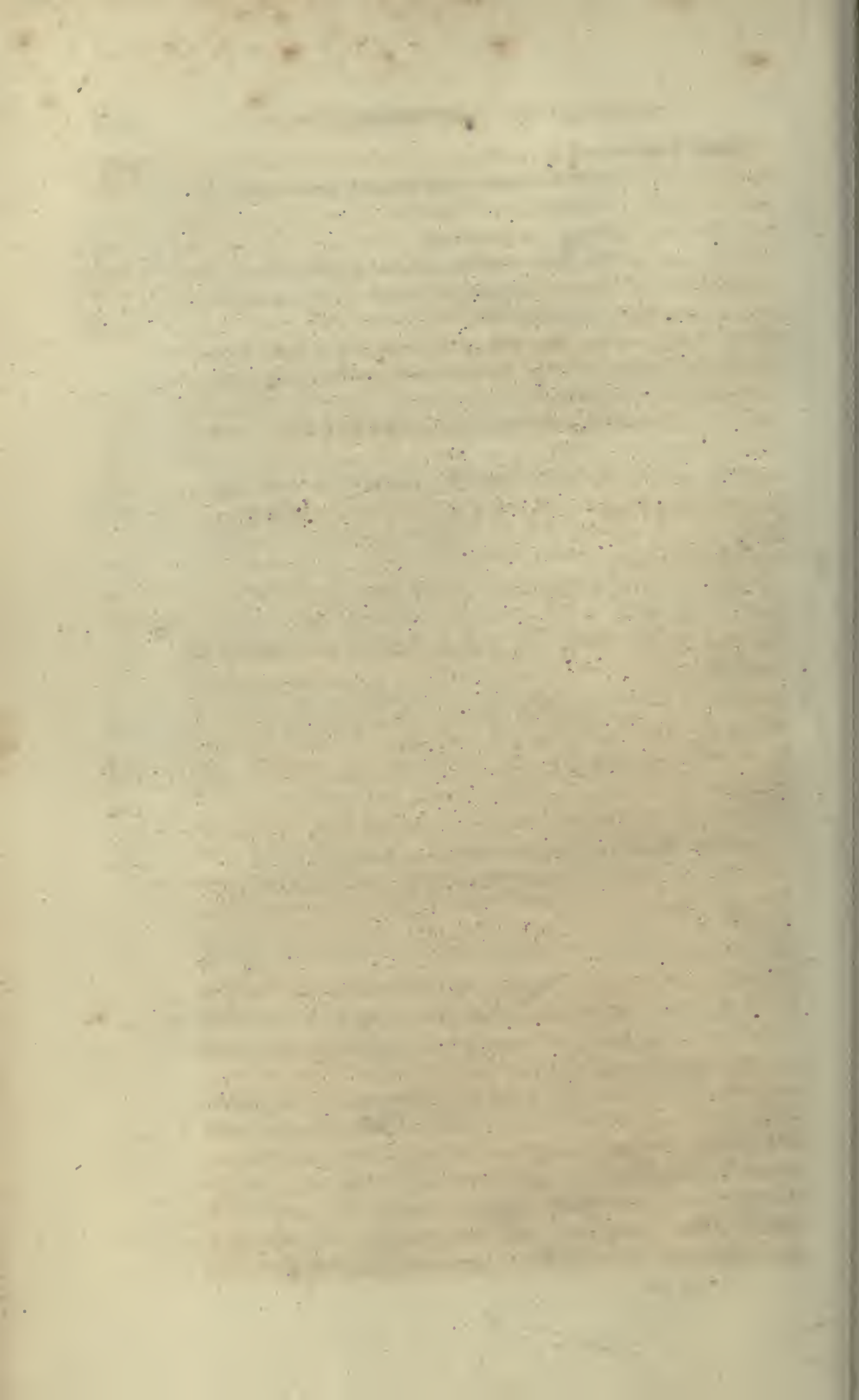
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THE
GENERAL ACTS
FOR THE
REGULATION OF RAILWAYS.

CONVEYANCE OF MAILS BY RAILWAYS.

1 & 2 VICTORIA, c. 98.

1 & 2 VICT.
c. 98.

An Act to provide for the Conveyance of the Mails by Railways (a). [14th August, 1838.]

WHEREAS it is expedient that provision should be made by law for the conveyance of the mails by railways at a reasonable rate of charge to the public: be it enacted, that in all cases of railways already made or in progress, or to be hereafter made within the united kingdom, by which passengers or goods shall be conveyed in or upon carriages drawn or impelled by the power of steam, or by any locomotive or stationary engines, or animal or other power whatever (b), it shall be lawful for the postmaster-general, by notice in writing under his hand delivered to the company of proprietors of any such railway, to require that the mails or post letter bags shall, from and after the day to be named in any such notice (being not less than twenty-eight days from the delivery thereof,) be conveyed and forwarded by such company on their railway, either by the ordinary trains of carriages, or by special trains, as need may be, at such hours or times in the day or night as the postmaster-general shall direct, together with the guards appointed and employed by the postmaster-general in charge thereof, and any other officers of the post-office; and thereupon the said company shall, from and after the day to be named in such notice, at

Postmaster-general may require railway companies to convey the mails.

1 & 2 Vict.
c. 98.

[*2]

their own costs, provide sufficient carriages and engines on such railways for the conveyance of such mails and post letter bags to the satisfaction of the postmaster-general, and receive, take up, carry and convey, by such ordinary or special trains of carriages or otherwise, as need may be all such mails or post *letter bags as shall for that purpose be tendered to them, or any of their officers, servants or agents by any officer of the post-office, and also receive, take up, carry and convey in and upon the carriages carrying such mails or post letter bags, the guard in charge thereof, and any other officers of the post office, and shall receive, take up, deliver and leave such mails or post letter bags, guards and officers, at such places in the line of such railway, on such days, at such hours or times in the day or night, and subject to all such reasonable regulations and restrictions as to speed of traveling, places, times and duration and stoppages, and times of arrival, as the postmaster-general shall in that behalf from time to time order or direct: provided always, that the rate of speed to be required shall in no case exceed the maximum rates of speed prescribed by the directors of such railway or railways for the conveyance of passengers by their first class trains; but that no alteration in the rate of speed of any train by which the mails shall be conveyed shall be made until six calendar months' previous notice shall be given to the postmaster-general of any such intended alteration.

(a) By stat. 7 & 8 Vict. c. 85, s. 11, *post*, p. 45, railway companies are required to afford additional facilities for the transmission of mails.

Future rail-
ways made
subject to
general rail-
way acts.

It is to be observed that the special acts authorizing the construction of railways refer to this statute, and to the statutes 3 & 4 Vict. c. 97; 5 & 6 Vict. c. 55; 7 & 8 Vict. c. 85; 9 & 10 Vict. c. 57 and 14 & 15 Vict. c. 64; and provide to the effect, that nothing in the special act contained shall be held to exempt the railway to be made under such act, or the company thereby constituted, from the provisions of the said several acts, but that such provisions shall be in force in respect to such new railway and company, so far as the same shall be applicable thereto. See the special railway acts passed in the year 1852.

The following clause is required to be inserted in the special acts authorizing the construction of railways—That nothing therein contained shall be deemed or construed to exempt the railway by that act [or the recited acts] authorized to be made from the provisions of any general act relating to such acts, or of any general act relating to railways, now in force or which may hereafter pass during this or any future session of Parliament, or from any future revision and alteration under the authority of Parliament of the maximum rates of fares and charges authorized by the special act [or by the said recited acts]. Standing Orders, 25th June, 1852, H. C. 137. 1 & 2 Vict.
c. 98.

(b) A railway has been defined, a road or way on which iron rails are laid for wheels to run on; Webster's American Dict. A road or way on which iron rails are laid for wheels *of vehicles adapted for it to run on; Smart's Dict.; see 2 Railw. C. 321, n. As to the meaning of the word "railway," when used in the subsequent statutes, see 3 & 4 Vict. c. 97, s. 21; 5 & 6 Vict. c. 55, s. 21; *post*, p. 22; 7 & 8 Vict. c. 85, s. 25; 8 & 9 Vict. c. 20, s. 3, *post*. As to what railway is to be considered a passenger railway, see 5 & 6 Vict. c. 55, s. 12; *post*, p. 29; 7 & 8 Vict. c. 85, s. 25. A railway is a public highway, to be used in a particular mode. Per Holroyd, J., 2 B. & Ald. 648. (1). Definition of
railway.
[*3]

(1) Per Hall J. A Rail Road is an improved highway.—21 Ver. Rep. 594.

II. (c) That it shall be lawful for the postmaster-general (if he shall see fit) to require that the whole of the inside of any carriage used on any railway for the conveyance of mails or post letter bags, shall be exclusively appropriated for the purpose of carrying the mails. If required,
carriage to be
applied ex-
clusively to
such convey-
ance.

(c) The words "And be it enacted," occurring at the beginning of this and the following sections, are omitted.

III. That the company of proprietors of any such railway shall, on being required so to do by the postmaster-general, provide and furnish (in addition to the carriages aforesaid) a separate carriage or separate carriages, fitted up as the postmaster-general, or such person as he shall nominate in that behalf, shall direct, for the purpose of sort- Railway
company, if
required, to
provide sep-
arate carri-
age for sort-
ing letters.

1 & 2 VICT.
c. 98

ing letters therein, and shall forward the same carriage or carriages by their railway, at such hours or times, and subject to all such reasonable regulations as aforesaid, as the postmaster-general shall in that behalf order or direct; and such company of proprietors shall receive, take up, carry and convey in any such last mentioned carriage or carriages all such post letter bags and officers of the post-office as the postmaster-general shall reasonably require, and shall deliver and leave any post letter bags and officers of the post-office at such places on the line of the railway as the postmaster-general shall in that behalf from time to time reasonably order and direct.

Postmaster-general may direct mails to be carried on railway in mail coaches in lieu of company's carriages.

IV. That in case the postmaster-general shall at any time be desirous of sending by any such railway any of her majesty's mail coaches or mail carts, with the mails or post letter bags and guards thereof, and carriages for sorting letters, with any officers of the post-office therein, instead of sending the said mails or post letter bags, guards and officers of the post-office by carriages to be provided by such railway company as aforesaid, then and in any such cases such railway company shall, at the request of the postmaster-general, signified by such notice as aforesaid, cause such mail *coaches or mail carts with the mails or post letter bags and guards thereof, and carriages for sorting letters, with any officers of the post-office therein, to be conveyed by the usual or proper trucks or frames on their said railway, subject to such regulations and restrictions of the postmaster-general as herein before mentioned.

[*4]

Railway companies to be subject to directions of post office respecting conveyance of mails.

V. That for the greater security of the mails or post letter bags so to be carried or conveyed by railways, the company of proprietors of such respective railways, along with such mails or post letter bags, mail coaches, or carts and carriages for sorting letters shall be so required by the postmaster-general to be conveyed, and their respective officers, servants and agents, shall obey, observe and perform all such reasonable regulations respecting the conveyance, delivering and leaving of such mails and post letter bags, guards and officers of the post-office, mail coaches, or carts and carriages, on any such railways, or on the line thereof, as the postmaster-general, or such officer of the post-office as he shall nominate in that behalf, shall in his discretion from time to time

give or make : provided always, that it shall not be lawful for ^{1 & 2 Vict.} any officer or servant of the post-office to interfere with c. 98. or give order to the engineer or other persons having the charge of any engine upon any railway along which mails or post letter bags shall be conveyed ; but if any cause of complaint shall arise, the same shall be stated to the conductor, or other officer of the railway company having charge of the train, or to the chief officer at any station upon the railway ; and in case of any default or neglect on the part of any officers or servants of the railway company to comply with any of the regulations of the postmaster-general or other officer of the post-office so to be nominated as aforesaid, the railway company shall be wholly responsible for the same. See 10 & 11 Vict. c. 85, ss. 16, 20, *post*, 12, n. (g).

Provisions as to the Remuneration of Companies.

VI. That every company of proprietors of any railway along which such mails or post letter bags, mail coaches, carts or carriages shall be so required by the postmaster-general, to be conveyed, shall be entitled to such reasonable remuneration to be paid by the postmaster-general to any such company of proprietors for the conveyance of such mails, post letter bags, mail guards and other officers of the post-office, mail coaches, carts and carriages, in manner required by such postmaster general, or by such officer of the post-office as he shall in that behalf nominate as aforesaid, as shall (either *prior to or after the commencement of such service) be fixed and agreed on between the postmaster general and such company of proprietors, or in case of difference of opinion between them, then as shall be determined by arbitration as hereinafter provided, but so that the services which may be required by the postmaster-general, or by such officer of the post-office as he in that behalf shall nominate as aforesaid, to be performed by any such company of proprietors, be not suspended, postponed or deferred by reason of such remuneration not having been then fixed or agreed on between the said postmaster-general and such company of proprietors, or by reason of the award on any reference to arbitration to determine the remuneration not having been then made.

Remuneration to railway companies for conveyance of mails.

[*5]

VII. That notwithstanding any agreement entered into between the postmaster-general and any such company, or

Agreements between postmaster-general

1 & 2 Vict.
c. 98.

al and rail-
way compa-
nies as to
amount of re-
muneration,
&c., may be
altered.

any award to be made on any such reference as aforesaid, fixing the amount of remuneration to be paid to such company for any services to be rendered by them as aforesaid, it shall be lawful and competent to and for the postmaster-general, by notice in writing, to require, from and after the day to be named in any such notice, not being less than twenty-eight days from delivery thereof, any addition to be made to the services in respect of which such agreement shall be entered into or award made; and in any such case, and also in case of a discontinuance of any part of such services, as hereinafter provided, a fresh agreement shall be entered into between the postmaster general and such company, regulating the future amount of remuneration to be paid by the postmaster-general to such company for such increased or diminished services, as the case may be; or if the parties cannot agree on such amount the same shall be referred to arbitration in like manner as hereinbefore is mentioned and hereinafter provided as to any original agreement (*d*); and such arbitrators shall have power to award any compensation they may consider reasonable to be paid to any railway company for any loss that may have been occasioned to them by the discontinuance or alteration of the services previously agreed to be performed by them by any train or carriage specially required by the postmaster-general, to be forwarded for the conveyance of the mails, but so that nevertheless such increased or diminished services shall not be suspended, postponed or deferred by reason *of the amount of such increased or diminished remuneration not having been then fixed or agreed on between the postmaster-general and such company of proprietors, or by reason of the award on any reference or arbitration to determine the amount of such increased or diminished remuneration not having been then made.

[*6]

(*d*) Sect. 16, p. 10.

Postmaster-
general may
terminate ser-
vices of rail-
way compa-
nies on notice,

VIII. That it shall be lawful for the postmaster-general, and he is hereby authorized, at any time during the continuance of the services of any company of proprietors as aforesaid, to give to such company, by writing under his hand, six calendar months' previous notice that such services or any part thereof shall cease and determine; and thereupon at the expiration of such six calendar months' notice, the said

services, or such part thereof as aforesaid, and the remuneration for the same, shall cease and determine. 1 & 2 VICT.
c. 98.

IX. That it shall be lawful for the postmaster-general at any time during the continuance of the services of any company of proprietors as aforesaid, by notice in writing under his hand, absolutely to determine and put an end to the same or any part thereof, without giving any previous notice, or on giving any notice less than six calendar months in respect thereof, and thereupon the said services shall cease and determine accordingly: provided nevertheless that in case the postmaster-general shall, without giving six calendar months' notice as aforesaid, at any time determine the services to be required by the postmaster-general of any company of proprietors, or any part of such services, without any cause whatever, or for any cause other than the default by such company of proprietors in the performance of any of the services to be required of them by the postmaster-general, or the breach by such company of proprietors of any of their engagements with the postmaster-general, then and in any such case the postmaster-general shall make to such company a full and fair compensation for all loss thereby occasioned, the amount whereof, in case the parties differ about the same, shall be ascertained by arbitration, as hereinafter mentioned (e).

(e) Sect. 16, p. 10.

Royal Arms.

X. That on all carriages to be provided for the service of the post-office on any such railway, there *shall on the outside be painted the royal arms, in lieu of the name of the owner and of the number of the carriage, and of all other requisites, if any, prescribed by law in respect of carriages passing on any such railway; but the want of such royal arms on any carriage belonging to or used by the post-office shall not form an objection to such carriage running on any railway, anything to the contrary notwithstanding. [*7]
Royal arms
to be painted
on engines or
carriages
provided for
the service of
the post-
office.

By-Laws contrary to this Act to be void.

XI. That it shall not be competent or lawful to or for the company of proprietors of any railway to make any by-laws, orders, rules or regulations which shall militate against or be contrary or repugnant to any of the enactments herein By laws of
railway com-
panies not to
be repugnant
to provisions
of act.

1 & 2 VICT.
c. 98.

contained ; and that if any company of proprietors shall make or shall have made any such by-laws, orders, rules or regulations, either prior or subsequently to the postmaster-general signifying to the said company his intention that the mails or post letter bags, mail coaches, carts or carriages, shall be conveyed by such railway, all such by-laws, orders, rules and regulations, so far as they shall militate against or be contrary or repugnant to any of the enactments herein contained, shall be and be deemed absolutely void and of no effect, in like manner as if such by-laws, orders, rules or regulations had never been made or passed, anything to the contrary in anywise notwithstanding.

Penalty for not conveying Mails.

Penalty for
refusing or
neglecting to
convey mails.

XII. That if the company of proprietors of any railway, or any of their respective officers, servants or agents, shall refuse or neglect to carry or convey any mails or post letter bags, when tendered to them for such purpose by the postmaster-general, or any officer of the post-office, or shall refuse to carry on their railway any mail coaches, carts or carriages, as herein before provided, when so required by the postmaster-general, or shall refuse or neglect to receive, take up, deliver and leave any such mails or post letter bags, mail guards or other officers of the post-office, mail-coaches, carts or carriages, at such places at such times, on such days, and subject to such regulations and restrictions as to speed of traveling, places, times and duration of stoppages, as the postmaster-general shall from time to time reasonably direct or appoint, as herein before provided, or shall not obey, observe and perform all such regulations respecting the conveyance *of the mails and post letter bags, mail coaches, carts and carriages on any such railways as the postmaster-general, or such officer of the post-office as he shall nominate in that behalf, shall make for the purposes aforesaid, then, and in any such case the company of proprietors who, or whose officer, servant, or agent shall so offend in the premises, shall for every such offence forfeit and pay a sum not exceeding twenty pounds; provided nevertheless, that the payment of or liability to such penalty shall not in any manner lessen or affect the liability of any such company under any bond which may have been given by them under the provisions hereinafter contained.

[*8]

*Security to be given by Railway Companies.*1 & 2 Vict.
c. 98.

XIII. That it shall be lawful for the postmaster-general, if he shall so think fit, to require the company of proprietors of any railway already made or in progress or to be hereafter made within the united kingdom, to give security by bond to her majesty, her heirs and successors, conditioned to be void if such company shall from time to time carry or convey, or cause to be carried or conveyed, all such mails or post letter bags, mail guards and other officers of the post office, mail coaches, carts and carriages in manner hereinbefore mentioned, when thereunto required by the postmaster-general, or any officer of the post-office duly authorised for that purpose, and shall receive, take up, deliver and leave all such mails or post letter bags, guards and officers, mail coaches, carts and carriages, at such places, at such times, on such days, and subject to such regulations and restrictions as to speed of traveling, places, times and duration of stoppages, as hereinbefore mentioned, and shall obey, observe and perform all such regulations respecting the same as the postmaster-general shall reasonably make, and shall well and truly do and perform, and cause to be done and performed, all such other acts, matters and things as by this act are required or directed to be done or performed by or on the part or behalf of such company, their officers, servants and agents; and every such bond shall be taken in such sum, and in such form as the postmaster-general shall think proper; and every such security shall be renewed from time to time whenever and so often as such bond shall be forfeited, and also whenever and so often as the postmaster-general shall in his discretion require the same to be renewed; and if any company of proprietors of any *such railway as aforesaid shall, when so required as aforesaid, refuse or neglect, for the space of one calendar month next after the delivery of any notice for such purpose to them given by or from the postmaster-general, to execute to her majesty, her heirs and successors, such bond to the effect and in manner aforesaid, or shall at any time refuse or neglect to renew such bond whenever and so often as the same shall by or in pursuance of this act be required to be renewed, such company of proprietors shall forfeit one hundred pounds for every day during the period for which there shall be any re-

Postmaster-general may require railway companies to give security by bond.

[*9]

1 & 2 Vict. fusal, neglect or default to give or renew such security as
 c. 98. aforesaid, after the expiration of the said one calendar
 month (f).

(f) Persons required to give security by bond to the post-office, may, with the consent of the lords of the treasury, or any three of them, transfer to or deposit with the postmaster-general, stock or exchequer bills for such an amount as in the judgment of such lords shall be a sufficient security against the contravention of the duty, for the performance of which such security is required. 6 & 7 Will. 4, c. 28, s. 1; 1 & 2 Vict. c. 61.

Lessees of
 railway, not
 being a body
 corporate or
 company, not
 to be required
 to give secu-
 rity by bond
 above 1000*l*.

XIV. Provided always, and be it enacted, that in all cases in which any railway or part of a railway may previous to the passing of this act have been demised or let by the company of proprietors thereof, the body corporate or company, or other persons to whom the same shall have been so demised or let, their successors, executors, administrators, or assigns, shall during the continuance of such lease be liable to all the provisions of this act for or in respect of such railway or part of a railway, in lieu of such company of proprietors, but so that such lessees (not being a body corporate or company), their executors, administrators, or assigns, shall not be required in respect of any such railway or part of a railway to give security under the foregoing enactment to any amount in any one bond exceeding the sum of one thousand pounds, and shall not in any one year be liable in damages to be recovered upon any bonds which they may have given to any amount exceeding the sum of one thousand pounds and costs of suit.

Service of no-
 tices.

XV. That all notices under the provisions of this act by or on behalf of the postmaster-general to any company of proprietors of any railway as aforesaid shall be considered as duly served on any company of proprietors in case the same shall be given or delivered to any one or more of the directors of such company, *or to the secretary, or clerk of such company, or be left at any station belonging to such company.

[*10]

For settling
 differences

Settlement of Differences by Arbitration.

XVI. That in all cases in which the postmaster-general

and any company of proprietors of any railway shall not be able to agree on the amount of remuneration or compensation to be paid by the postmaster-general to such company of proprietors for any services performed or to be performed by them as hereinbefore mentioned, the same shall be referred to the award of two persons, one to be named by the postmaster-general, and the other by such company; and if such two persons cannot agree on the amount of such remuneration or compensation, then to the umpirage of some third person to be appointed by such two first named persons previously to their entering upon the enquiry; and the said award or umpirage, as the case may be, shall be binding and conclusive on the said parties, and their respective successors and assigns.

1 & 2 VICT.
c. 98.

between postmaster-general and railway companies in certain cases.

XVII. That after any contract entered into or award made under the authority of this act shall have continued in operation for a period of three years, it shall be competent for any railway company who may consider themselves aggrieved by the terms of remuneration fixed by such contract or award, by notice under their common seal, to require that it shall be referred to arbitrators to determine whether any and what alteration ought to be made therein; and thereupon such arbitrators or umpire to be appointed as hereinbefore mentioned shall proceed to enquire into the circumstances, and make their award therein, as in the case of an original agreement: provided always, that the services performed by such railway company for the post-office shall in nowise be interrupted or impeded thereby.

Railroad companies, after contracts have existed for a certain period, may refer them to arbitrators to decide as to their continuance.

XVIII. That in all references to be made under the authority of this act, the postmaster-general, or the railway company, as the case may be, shall nominate his or their arbitrator within fourteen days after notice from the other party, or in default it shall be lawful for the arbitrator appointed by the party giving notice to name the other arbitrator: and such arbitrators shall proceed forthwith in the reference, and make their award therein within twenty-eight days after their appointment, or otherwise the matter shall be left to be determined by the umpire; and if such umpire shall refuse or neglect to proceed and make his award for the space of twenty-eight days after the matter shall have been referred to him, then a new umpire shall be appointed by the two first named

Nomination of arbitrators to be within a limited time after application for references made.

[*11]

1 & 2 VICT.
c. 98. arbitrators, who shall in like manner proceed and make his award within twenty-eight days, or in default be superseded, and so toties quoties.

Interpretation Clause.

Construction
of terms.

1 Vict. c. 36.

XIX. That whenever the term "company of proprietors," or "railway company," or "company" is used in this act, the same shall extend to and be construed to include the proprietors for the time being of any railway, whether a body corporate or individuals, and also (during the continuance of any demise or lease as aforesaid) any person, whether a body corporate or company or individuals, to whom any railway or part of a railway may previous to the passing of this act have been demised or let, and their successors, executors, administrators and assigns, unless the subject or context be otherwise repugnant to such construction (*g*); and that the provisions of this act, shall be construed according to the respective interpretations of the terms and expressions contained in an act passed in the first year of the reign of her present majesty, entitled "An Act for consolidating the Laws relative to Offences against the Post-Office of the United Kingdom, and for regulating the judicial Administration of the Post-Office Laws, and for explaining certain terms and expressions employed in those Laws," so far as those interpretations are not repugnant to the subject or inconsistent with the context of such provisions (*h*); and that this present act shall be deemed and construed to be a post-office act within the intent and meaning of the said last-mentioned act (*i*); and the pecuniary penalties hereby imposed shall be recovered and recoverable in the manner and form therein particularly mentioned and expressed with reference to the pecuniary penalties imposed by the post-office acts (*h*); provided nevertheless, that any justice of the peace having jurisdiction for any county through which any railway shall pass, in respect of which any penalty or forfeiture under this act shall have been incurred, shall and may hear and determine any offence against this act which may subject any company to a pecuniary penalty not exceeding twenty pounds; and a summons issued under the post-office acts by any such justice

[*12] against any railway company for the recovery* of any such penalty shall be deemed to be sufficiently served in case either the summons or a copy thereof be delivered to any

officer, servant or agent of such company, or be left at any station belonging to the company. ^{1 & 2 Vict.}
c. 98.

(g) The postmaster-general may require, in the manner prescribed by this act, any mails and post letter bags to be conveyed and forwarded by any railway company on their railway pursuant to this act, notwithstanding any guard or other officer of the post office shall not be sent with the same or in charge thereof. 10 & 11 Vict. c. 85, s. 16.

The term railway used in these acts includes every railway already constructed, or thereafter to be constructed, under the powers of any act of parliament, and the words "railway company," or "company of proprietors," used in the same acts, includes the proprietors for the time being of any such last-mentioned railway, and any lessees thereof. 10 & 11 Vict. c. 85, s. 20.

Interpreta-
tion of cer-
tain terms.

(h) "Officer of the post-office" shall include the postmaster-general, and every deputy postmaster, agent, officer, clerk, letter carrier, guard, post boy, rider, or any other person employed in any business of the post-office, whether employed by the postmaster-general or by any person under him or on behalf of the post-office. The term "postmaster-general" shall mean any person or body of persons executing the office of postmaster-general for the time being, having been duly appointed to the office by her majesty. The term "mail" shall include every conveyance by which post letters are carried, whether it be a coach, or cart, or horse, or any other conveyance, and also a person employed in conveying or delivering post letters. The term "mail bag" shall mean a mail of letters, or a box, or a parcel, or any other envelope in which post letters are conveyed, whether it does or does not contain post-letters. The term "post letter bag" shall include a mail bag or box, or packet, or parcel, or other envelope or covering in which the post letters are conveyed, whether it does or does not contain post letters. The term "post office" shall mean any house, building, room, or place where post letters are received or delivered, or in which they

1 & 2 VICT.
c. 98. are sorted, made up, or despatched. "Persons employed by or under the post-office" shall include every person employed in any business of the post-office, according to the interpretation given to officer of the post-office. 7 Will. 4 & 1 Vict. c. 36 s. 47.

(i) By 7 Will. 4 & 1 Vict. c. 36, s. 47, "post office acts," and "post-office laws," shall mean all acts relating to the management of the post or to the establishment of the post-office or to postage duties from time to time in force. See 7 Will. 4 & 1 Vict. c. 33, for the management of the post-office and 3 & 4 Vict. c. 96, for the regulation of the duties of postage.

[*13] (h) Penalties not exceeding 20*l.* are recoverable by a warrant of distress, to be granted by a justice after summons of *the offender, who may appeal to the quarter sessions against the conviction; 7 Will. 4 & 1 Vict. c. 36, s. 13. Justices have power to mitigate penalties, *ib.* s. 14; and may in certain cases award costs to the defendants where informations or complaints are withdrawn or dismissed; *ib.* s. 17. A summons is to be served personally or left at the last known residence of the party, and in some cases to be left with the bookkeeper; *ib.* s. 18. A penalty is imposed on officers for neglect of duty in serving summons, &c., *ib.* s. 19; and witnesses neglecting to attend are subject to a penalty of 10*l.* The officers of the post-office are not disqualified from being witnesses on account of being interested in the event of conviction; *ib.* s. 21. The mode of selling goods distrained under the act is prescribed; *ib.* s. 22. Penalties incurred under the post-office acts must be sued for within a year; *ib.* s. 24. The schedule to the act contains forms of information, summons, conviction, warrant of distress, and warrant of commitment for want of a distress.

GENERAL REGULATION OF RAILWAYS.

3 & 4 VICTORIA, c. 97.

*An Act for regulating Railways (a).*3 & 4 VICT.
c. 97.

[10th of August, 1840.]

Inspection previous to opening a Railway.

WHEREAS it is expedient for the safety of the public to provide for the due supervision of railways : be it therefore enacted, that, after two months from the passing of this act, no railway, or portion of any railway, shall be opened for the public conveyance of passengers or goods until one calender month after notice in writing of the intention of opening the same shall have been given, by the company to whom such railway shall belong, to the lords of the committee of her majesty's privy council appointed for trade and foreign plantations.

No railway to be opened without notice to the Board of Trade.

(a) By 5 & 6 Vict. c. 55, further provision is made for the supervision of railways, and that act and this are to be construed together, except so far as the provisions of the above act are repealed or shall be inconsistent with the provisions of 5 & 6 Vict. c. 55 ; see second section of latter act, *post*, p. 23.

II. The second section of this act imposed a penalty for opening railways without notice (b).

III. The third section required returns to be made by railway companies (b).

(b) The second and third section of this act are repealed by 5 & 6 Vict. c. 55, s. 3. see *post*, p. 23.

IV. That every officer of any company who shall wilfully make any false return to the lords of the said committee shall be deemed guilty of a misdemeanor.

Penalty for making false returns.

V. That it shall be lawful for the lords of the said committee, if and when they shall think fit, to authorize any proper person or persons to inspect any railway ; and it shall be

Board of Trade may appoint persons to in-

3 & 4 Vict.

c. 97.
spect rail-
ways.

[*15]

lawful for every person so authorized, at all reasonable times upon producing his authority, if required, to enter upon and examine the *said railway, and the stations, works, and buildings, and the engines and carriages belonging thereto : provided always, that no person shall be eligible to the appointment as inspector as aforesaid who shall within one year of his appointment have been a director or have held any office of trust or profit under any railway company (c).

(c) The power given by this section is extended by 7 & 8 Vict. c. 85, s. 15 ; *post*, p. 48, by which the above proviso is repealed.

Penalty on
persons ob-
structing in-
spector.

VI. That every person wilfully obstructing any person duly authorized as aforesaid, in the execution of his duty, shall on conviction before a justice of the peace having jurisdiction in the place where the offence shall have been committed, forfeit and pay for every such offence any sum not exceeding ten pounds ; and on default of payment of any penalty so adjudged, immediately or within such time as the said justice of the peace shall appoint, the same justice, or any other justice having jurisdiction in the place where the offender shall be or reside, may commit the offender to prison for any period not exceeding three calendar months ; such commitment to be determined on payment of the amount of the penalty ; and every such penalty shall be returned to the next ensuing court of quarter sessions in the usual manner.

Provisions as to By-Laws.

Copies of ex-
isting by-
laws to be
laid before
the Board of
Trade ;

VII. And whereas many railway companies are or may hereafter be empowered by act of parliament to make by-laws orders, rules, or regulations, and to impose penalties for the enforcement thereof, upon persons other than the servants of the said companies, and it is expedient that such power should be under proper control ; be it enacted, that true copies of all such by-laws, orders, rules, and regulations, made under any such powers, by every such company before the passing of this act, certified in such manner as the lords of the said committee shall from time to time direct, shall within two calendar months after the passing of this act, be laid before the lords of the said committee ; and that every such by-law, order, rule, or regulation, not so laid before the

otherwise to
be void.

lords of the said committee within the aforesaid period, shall from and after that period, cease to have any force or effect, saving in so far as any penalty may have been then already incurred under the same. 3 & 4 VICT.
c. 97.

*VIII. That no such by-law, order, rule, or regulation made under any such power, and which shall not be in force at the time of the passing of this act, and no order, rule, or regulation annulling any such existing by-law, rule, order, or regulation which shall be made after the passing of this act shall have any force or effect until two calendar months after a true copy of such by-law, order, rule, or regulation, certified as aforesaid, shall have been laid before the lords of the said committee, unless the lords of the said committee, shall before such period, signify their approbation thereof. (*16]
No future
by-laws to
be valid till
two calendar
months after
they have
been laid be-
fore the
Board of
Trade.

IX. That it shall be lawful for the lords of the said committee, at any time either before or after any by-law, order, rule or regulation shall have been laid before them as aforesaid shall have come into operation, to notify to the company who shall have made the same their disallowance thereof, and, in case the same shall be in force at the time of such disallowance, the time at which the same shall cease to be in force; and no by-law, order, rule or regulation which shall be so disallowed shall have any force or effect whatsoever, or, if it shall be in force at the time of such disallowance, it shall cease to have any force or effect at the time limited in the notice of such disallowance, saving in so far as a penalty may have been then already incurred under the same (*d*). Board of
Trade may
disallow by-
laws.

(*d*) Railway companies cannot make by-laws repugnant to the provisions of the act for conveying mails; 1 & 2 Vict. c. 98, s. 11, *ante*, p. 7. Subject to the provisions of this act, further provisions for making and publishing by-laws of railway companies are contained in 8 & 9 Vict. c. 20, ss. 109, 110; and such by-laws are to be binding on all parties; s. 111. See 8 & 9 Vict. c. 16, ss. 124—127. See the code of by-laws, framed by the Board of Trade, in the Appendix.

X. That so much of every clause, provision and enactment in any act of parliament heretofore passed as may require the approval or concurrence of any justice of the peace, court Provisions of
railway acts
requiring
confirmation

3 & 4 Vict.
c. 97.

of by-laws
repealed.

of quarter sessions or other person or persons, other than members of the said companies, to give validity to any by-laws, orders, rules, or regulations made by any such company shall be repealed.

XI. The 11th section authorized the Board of Trade to direct prosecutions to enforce provisions of railway acts, but this provision is altogether repealed by 7 & 8 Vict. c. 85, s. 16, and another provision substituted by the 17th section of the latter act, *post*, pp. 48, 49.

[*17]
Prosecution
to be under
sanction of
Board of
Trade, and
within one
year after the
offence.

*XII. That no legal proceedings shall be commenced under the authority of the lords of the said committee against any railway company for any offence against this act, or any of the several acts of parliament relating to railways, except upon such certificate of the lords of the said committee as aforesaid and within one year after such offence shall have been committed.

Police Regulations.

Punishment
of servants of
railway com-
panies guilty
of miscon-
duct.

XIII. That it shall be lawful for any officer or agent of any railway company, or for any special constable duly appointed and all such persons as they may call to their assistance, to seize and detain any engine driver, guard, porter or other servant in the employ of such company who shall be found drunk while employed upon the railway, or commit any offence against any of the by-laws, rules or regulations of such company, or shall wilfully, maliciously or negligently do or omit to do any act whereby the life or limb of any person passing along or being upon the railway belonging to such company, or the works thereof respectively, shall be or might be injured or endangered, or whereby the passage of any of the engines, carriages or trains shall be or might be obstructed or impeded and to convey such engine driver guard, porter or other servants so offending, or any person counselling, aiding or assisting in such offence, with all convenient despatch, before some justice of the peace for the place within which such offence shall be committed, without any other warrant or authority than this act ; and every such person so offending, and every person counselling, aiding or assisting therein as aforesaid, shall when convicted before such justice as aforesaid, (who is hereby authorized and required, upon complaint to him made, upon oath, without information in writing, to take cognizance thereof, and to act

summarily in the premises,) in the discretion of such justice, ^{3 & 4 Vict.} be imprisoned, with or without hard labor, for any term not ^{c. 97.} exceeding two calendar months, or, in the like discretion of such justice, shall for every such offence forfeit to her majesty any sum not exceeding ten pounds, and in default of payment thereof shall be imprisoned, with or without hard labor as aforesaid, for such period, not exceeding two calendar months, as such justice shall appoint; such commitment to be determined on payment of the amount of the penalty; and every such *penalty shall be returned to the next ensuing court of quarter sessions in the usual manner (e). [*18]

(e) This section [is altered and extended by stat. 5 & 6 Vict c. 55, s. 17; see *post*, p. 32.

XIV. Provided always, and be it enacted, that (if upon the hearing of any such complaint he shall think fit) it shall be lawful for such justice, instead of deciding upon the matter of complaint summarily, to commit the person or persons charged with such offence for trial for the same at the quarter sessions for the county or place wherein such offence shall have been committed, and to order that any such person so committed shall be imprisoned and detained in any of her majesty's jails or houses of correction in the said county or place in the meantime, or to take bail for his appearance, with or without sureties, in his discretion; and every such person so offending, and convicted before such court of quarter sessions as aforesaid (which said court is hereby required to take cognizance of and hear and determine such complaint), shall be liable, in the discretion of such court, to be imprisoned, with or without hard labor, for any term not exceeding two years (f).

(f) The sheriffs have jurisdiction in Scotland, 5 & 6 Vict. c. 55, s. 18, *post*, p. 34.

XV. That from and after the passing of this act every person who shall wilfully do or cause to be done anything in such manner as to obstruct any engine or carriage using any railway, or to endanger the safety of persons conveyed in or upon the same, or shall aid or assist therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court before which he shall

Justice of the peace empowered to send any case to be tried by the quarter sessions.

Punishment of persons obstructing railway.

1 & 4 Vict. c. 97. have been convicted, to be imprisoned, with or without hard labor, for any term not exceeding two years (*g*).

Indictment
for endanger-
ing passen-
gers' safety.

(*g*) On an indictment under this section for unlawfully and wilfully doing anything to endanger the safety of persons conveyed in or upon any railway, it is unnecessary to allege or prove that the railway was constructed or worked under the powers of an act of parliament; *Reg. v. Bowring*, 10 Jur. 211. Under such an indictment it is enough to show that the accused wilfully did the act charged, and that it was of a nature to endanger the safety of persons upon the railway; it is no defence that he did not intend to do any injury; *ib*. A person who throws a stone at an engine or carriage *using a railway may be indicted under this section for doing an act to endanger the safety of persons conveyed on the railway, and the indictment may contain a count at common law for throwing the stone at the carriages.

[*19]

Ib. See stat. 14 & 15 Vict. c. 19, ss. 6—8, *post*.

Railway
tickets.

A railway ticket is a valuable chattel, within the meaning of the 7 & 8 Geo. 4, c. 29, s. 53, and an indictment for obtaining it by false pretences is sustainable, although the ticket is to be given up at the end of the journey; for that did not prevent it, while of value to the holder, as enabling him to travel gratis, from being a chattel under the act. *Reg. v. Boulton*, 3 New Sess. Cas. 706; 13 Jur. 1034; 2 Car. & K. 919; 1 Den. C. C. 508; 1 Temp. & M. 201.

The *forgery* of a railway pass, to allow the bearer to pass free on a railway, is a forgery at common law, but the uttering it *per se* is not a misdemeanor. The uttering of a forged instrument, the forgery of which is only a forgery at common law, it is no offence unless some fraud was actually perpetrated by it; and where, in such a case, the indictment contained some counts for forging the instrument and others for uttering it, and the defendant was acquitted on the counts for the forgery and convicted on the counts for the uttering, the judgement was arrested. *Reg. v. Boulton*, 2 Carr. & K. 604.

Scrip certifi-
cates.

A scrip certificate in a railway company is not an "accountable receipt" nor an "acquittance or receipt" within

the meaning of the stat. 11 Geo. 4 & 1 Will. 4, c. 66, s. 10 ; 1 & 2 VICT. c. 98. therefore the forgery of such document is not a felony, but a misdemeanor only. *Clarke v. Newsam*, 1 Exch. R. 131 ; Law J. 1847, Exch. 296 ; 5 Railw. C. 69.

A railway scrip certificate, signed by two of the directors, and which states that the holder of it "having paid the deposit of 5*l*., signed the parliamentary contracts and subscribers agreement, and agreed to pay all costs in respect thereof, is the proprietor of one share of 50*l*., part of the additional capital;" and which states that the share represented by this certificate will bear interest at the rate of 5*l*., "from 1st of January, 1847, to 1st July, 1853," and after that a share in the net profits of the company, is neither a "receipt" nor an "acquittance" nor an "accountable receipt" within the stat. of 1 Will. 4, c. 66, s. 10, and the forgery of such certificate is not therefore an offence against that statute. *Reg. c. v. West*, 2 Carr. & K. 496. See *Rex. v. Mott*, 2 Car. & P. 521, *post*.

XVI. That if any person shall wilfully obstruct or impede any officer or agent of any railway company in the execution of his duty upon any railway, or upon or in any of the stations or other works or premises connected therewith, or if any person shall wilfully trespass upon any railway, or any of the stations or other works or premises connected therewith, and shall refuse to quit the same upon [request to him *made by any officer or agent of the said company, every such person so offending, and all others aiding or assisting therein, shall and may be seized and detained by any such officer or agent, or any person whom he may call to his assistance, until such offender or offenders can be conveniently taken before some justice of the peace for the county or place wherein such offence shall be committed, and when convicted before such justices as aforesaid (who is hereby authorized and required, upon complaint to him upon oath, to take cognizance thereof, and to act summarily in the premises,) shall, in the discretion of such justice, forfeit to her majesty any sum not exceeding five pounds, and default of payment thereof shall or may be imprisoned for any term not exceeding two calendar months, such imprisonment to be determined on payment of the amount of the penalty (*h*).

For publication of person obstruction the officers of any railway company, or trespassing upon any railway.

[*20]

3 & 4 Vict.
c. 97.

(h) An owner of land severed by a railway claimed compensation, from the company; the question was submitted to a jury, who awarded compensation, on the footing that there was to be a total separation of his land without any communication being made, and he received the payment as such compensation: it was held that there was an arrangement with the company under the 111th section of the railway act 6 & 7 Will. 4, c. 106, and that the owner afterwards crossing the railway for the purpose of the occupation of his land was a trespasser within the section. See *Manning v. Eastern Counties Railway Company* 12 Mee. & W. 237; Law J. 144, Exch. 265; *post*, 8 & 9 Vict. c. 20, s. 74, n.

Certiorari.

Proceedings
not to be
quashed for
want of form
or removed
into the su-
perior courts.

XVII. That no proceeding to be had and taken in pursuance of this act shall be quashed or vacated for want of form or be removed by certiorari, or by any other writ or process whatsoever, into any of her majesty's courts of record at Westminster or elsewhere, any law or statute to the contrary notwithstanding.

Openings in Ledges or Flanches of Railway.

Repeal of all
provisions in
railway acts
that empower
two justices
to decide
dispute res-
pecting the
proper places
for openings
in ledges or
flanches of
railways.

[*21]

XVIII. And whereas many railway companies are bound, by the provisions of the acts of parliament by which they are incorporated or regulated, to make, at the expense of the owner or occupier of lands adjoining the railway, openings in the ledges or flanches thereof (except at certain places on such railway in the said acts specified), for effecting communications between such railway and any collateral or branch railway to *be laid down over such lands, and any disagreement or difference which shall arise as to the proper places for making any such openings in the ledges or flanches is by such acts directed to be referred to the decision of any two justices of the peace within their respective jurisdictions: and whereas it is expedient that so much of every clause, provision, and enactment in any act of parliament heretofore passed as gives to any justice or justices the power of hearing or deciding upon any such disagreement or difference as to the proper places for any such openings in the ledges or flanches of any railway, should be repealed; be it therefore

enacted, that so much of every such clause, provision and enactment as aforesaid shall be repealed (i). 3 & 4 Vict.
c. 97.

(i) See 5 & 6 Vict. c. 55, s. 12, *post*, p. 29.

XIX. That in case any disagreement or difference shall arise between any such owner or occupier, or other persons, and any railway company, as to the proper places for any such openings in the ledges or flanches of any railway, (except at such places as aforesaid), for the purpose of such communication, then the same shall be left to the decision of the lords of the said committee, who are hereby empowered to hear and determine the same in such way as they shall think fit, and their determination shall be binding on all parties.

Board of Trade to determine such disputes in future.

Notices, &c. to and by Board of Trade.

XX. That all notices, returns, and other documents, required by this act to be given to or laid before the lords of the said committee shall be delivered at or sent by the post to the office of the lords of the said committee; and all notices, appointments, requisitions, certificates or other documents in writing, signed by one of the secretaries of the said committee, or by some officer appointed for that purpose by the lords of the said committee, shall, for the purpose of this act, be deemed to have been made by the lords of the said committee; and service of the same upon any one or more of the directors of any railway company, or on the secretary or clerk of the said company, or by leaving the same with the clerk or officer at one of the *stations belonging to the said company, shall be deemed good service upon the said company (k).

Communications to the Board to be left at their office.
Communications by the Board how to be authenticated.
What shall be deemed good service on railway company.

(k) This section is altered and extended by 5 & 6 Vict. c. 55, s. 19; *post*, p. 34; 7 & 8 Vict. c. 85, s. 23; see *post*.

Interpretation Clause.

XXI. That wherever the word "railway" is used in this act it shall be construed to extend to all railways constructed under the powers of any act of parliament, and intended for the conveyance of passengers in or upon carriages drawn or impelled by the power of steam, or by any other mechanical power; and wherever the word "company" is used in this

Meaning of the words "railway" and "company."

3 & 4 Vict.
c. 97.

act it shall be construed to extend to and include the proprietors for the time being of any such railway, whether a body corporate or individuals, and their lessees, executors, administrators and assigns, unless the subject or context be repugnant to such construction (*l*).

(*l*) See the interpretation clause in 5 & 6 Vict. c. 55, s. 21, *post*, p. 36, in which an alteration is made.

*GENERAL REGULATION OF RAILWAYS.

[*23]

5 & 6 VICTORIA, c. 55.

5 & 6 VICT.
c. 55.

*An Act for the better Regulation of Railways, and for the
Conveyance of Troops.* [30th July, 1842.]

WHEREAS by an act passed in the third and fourth years of the reign of her present majesty, entitled "An Act for regulating Railways," provision was made for the supervision of railways (a): and whereas it is expedient for the safety of the public to make further provision for that purpose; be it enacted, that this act shall come into operation on the passing thereof.

Commence-
ment of act.(a) *Ante*, p. 14.

II. That the provisions of the said recited act and of this act shall be construed together as one act, except so far as the provisions of the said recited act are hereby repealed, or shall be inconsistent with the provisions of this act.

Recited act
and this act to
be construed
together.

III. This section recited the second and third sections of 3 & 4 Vict. c. 97, which required notice before opening a railway, and enacted, that the said recited provisions of the said act shall be and they are hereby repealed.

Notice before
opening rail-
way repeal-
ed.*Provisions as to opening Railways.*

IV. That no railway or portion of any railway shall be opened for the public conveyance of passengers until one calendar month after notice in writing of the intention of opening the same shall have been given, by the company to whom such railway shall belong, to the lords of the committee of her majesty's privy council appointed for trade and foreign plantations, and until ten days after notice in writing shall have been given by the said company to the lords of the said committee of the time when the said railway or portion of railway will be, in their opinion, sufficiently completed for the safe conveyance of passengers, and ready for inspection. (b).

Notice of in-
tended open-
ing of rail-
way.

(b) The effect of the certificate of the Board of Trade under this act, is merely to show that there is a chance of safety

Effect of cer-
tificate of
Board of
Trade.

5 & 6 Vict.
c. 55.

[24]

and that the line is so far fit, but it does not indicate that the necessity for protecting the public against workmen *employed in the construction of the line has ceased. By a railway act the sheriff of any county in which the works of the railway should be in progress of construction, was authorized to appoint "constables during the construction of the said railway and works." Constables were duly appointed, whose wages were paid by the company up to the time when the railway was opened with the sanction of the Board of Trade for public traffic. After the opening of the railway a considerable number of workmen continued the employment, but the railway company refused to pay the wages of the constables who remained, on the ground that the works of the railway were no longer "in progress of construction."—It was held that the liability of the company for the wages of the constables did not cease on the opening of the line, but continued so long as workmen were employed in completing any works on or connected with the railway. *North British Railway Company v. Horne*. 5 Railw. C. 231. See 8 & 9 Vict. c. 3, as the appointment of constables in Scotland during the construction of railways and public works.

The 9 & 10 Vict. c. 105, s. 11, which is repealed by 14 & 15 Vict. c. 64, see *post*, gave the railway commissioners power to inspect and survey any *proposed line* of railway.

If railway
opened with-
out notice,
company to
forfeit 20l.

V. That if any railway or portion of any railway shall be opened without such notice as aforesaid, the company to whom such railway shall belong shall forfeit to her majesty the sum of twenty pounds for every day during which the same shall continue open until the said notices shall have been duly given and shall have expired; and every such penalty may be recovered in any of her majesty's courts of record, or in the court of session or in any of the sheriff's courts in Scotland.

Board of
Trade em-
powered to
postpone the
opening.

VI. That if the officer or officers appointed by the lords of the said committee to inspect any such railway or portion of railway shall, after inspection thereof, report in writing to the lords of the said committee that in his or their opinion the opening of the same would be attended with danger to the public using the same, by reason of the incompleteness

of the works or permanent way, or the insufficiency of the establishment for such railway, together with the grounds of such opinion, it shall be lawful for the lords of the said committee, and so from time to time, as often as such officers shall after further inspection thereof so report, to order and direct the company to whom such railway shall belong to postpone such opening for any period not exceeding one calendar month at any one time, until it shall appear to the lords of the said committee that such opening may take place without danger to the public; and if any such railway, or any portion thereof, shall be opened *contrary to any such order and direction of the lords of the said committee, the company to whom such railway shall belong shall forfeit to her majesty the sum of twenty pounds for every day during which the same shall continue open contrary to such order and direction; and any such penalty may be recovered in any of her majesty's courts of record, or in the court of session or in any of the sheriff's courts in Scotland: provided always, that no such order as aforesaid shall be binding upon any railway company unless therewith shall be delivered to the said company a copy of the report of the officer or officers on which such order shall be founded.

[*25]

Notice of Accidents.

VII. That every railway company shall, within forty-eight hours after the occurrence upon the railway belonging to such company of any accident attended with serious personal injury to the public using the same, give notice thereof to the lords of the said committee; and if any company shall wilfully omit to give such notice, every such company shall forfeit to her majesty the sum of five pounds for every day during which the omission to give the same shall continue; and every such penalty may be recovered in any of her majesty's courts of record, or in the court of session or in any of the sheriff's courts in Scotland.

Notice of accidents to be given to the Board of Trade.

Return of Accidents.

VIII. That the lords of the said committee may order and direct any railway company to make up and deliver to them returns of serious accidents occurring in the course of the public traffic upon the railway belonging to such company, whether attended with personal injury or not, in such form

Board of Trade empowered to direct returns.

5 & 6 VICT.
c. 55.

and manner as the lords of the said committee shall deem necessary and require for their information with a view to the public safety; and if any such returns shall not be so delivered within fourteen days after the same shall have been required, every such company shall forfeit to her majesty the sum of five pounds for every day during which the said company shall neglect to deliver the same; and every such penalty may be recovered in any of her majesty's courts of record, or in the courts of session, or in any of the sheriff's courts in Scotland: provided always, that all such returns shall be privileged communications, and shall not be evidence in any court whatsoever.

[*26]

** Gates at Level Crossings.*

Gates at
level cross-
ings to be
kept closed
across the
road.
2 & 3 Vict.
c. 45.

IX. And whereas by an act passed in the second and third years of her present majesty, and entitled "An Act to amend an Act of the fifth and sixth years of his late Majesty King William the Fourth, relating to Highways," it was enacted, that whenever a railway crosses or shall hereafter cross any turnpike road, or any other highway or statute labor road for carts or carriages in Great Britain, the proprietors or directors of the said railway shall make and maintain good and sufficient gates across each end of such turnpike or other road at each end of the said crossings, and shall employ good and proper persons to open and shut such gates, so that the persons, carts or carriages passing along such turnpike or other road shall not be exposed to any danger or damage by the passing of any carriages or engines along the said railway (c): and whereas by the acts relating to certain railways it is provided that such gates shall be kept constantly closed across the railway, except during the time when carriages or engines passing along the railway shall have to cross such turnpike or other road: and whereas experience has shown that it is more conducive to safety that such gates should be kept closed across the turnpike or other road instead of across the railway; be it therefore enacted, that, notwithstanding any thing to the contrary contained in any act of parliament heretofore passed, such gates shall be kept constantly closed across each end of such turnpike or other roads, in lieu of across the railway, except during the time when horses, cattle, carts or carriages passing along such turnpike

or other road shall have to cross such railway; and such gates shall be of such dimensions and so constructed as, when closed across the ends of such turnpike or other roads, to fence in the railway, and prevent cattle or horses passing along the road from entering upon the railway while the gates are closed (*d*): provided always, that it shall be lawful for the lords of the said committee, in any case in which they are satisfied that it will be more conducive to the public safety that the gates at any level crossing over any such turnpike or other road should be kept closed across the railway, to order and direct that such gates shall be kept so closed, instead of across the road; and such order of the lords of the said committee shall be a sufficient authority for the directors or proprietors of any railway company to *whom such order is addressed for keeping such gates closed, in the manner directed by the lords of the said committee (*e*).

1 & 2 Vict.
c. 99.

Proviso.

[*27]

(*c*) The remainder of this section is as follows: "And any complaint for any neglect in respect to the said gates shall be made within one calendar month after the said neglect, to any justice of the peace, or if in Scotland to the sheriff of the county who may summon the party so complained against to appear before them or him at the next petty session or court to be holden for the district or division within which such gates are situate, who shall hear and decide upon the said complaint; and the proprietor or director so offending shall for each and every day of such neglect, forfeit any sum not exceeding five pounds, together with such costs as to the justice or sheriff depute aforesaid, before whom the conviction shall take place, shall think fit."

Penalty 5*l*.
for each day
neglect.

The penalties imposed by 2 & 3 Vict. c. 45, and the costs to be allowed and ordered by the authority of that act, shall in England be recovered and applied in the same manner as any penalties or costs under the act 5 & 6 Will. 4, c. 50; and in Scotland shall be recovered and applied to the maintenance of the statute labor roads within the district where the offence is committed; 2 & 3 Vict. c. 45, s. 2.

How penalties for not keeping gates closed across roads shall be recovered and applied.

By 5 & 6 Will. 4, c. 50, s. 101, in all cases in which any penalty or forfeiture is recoverable before justices of the peace

Justices may proceed by summons in

5 & 6 VICT. under that act, any justice to whom complaint shall be made
 c. 55. of any such offence may summon the party complained
 the recovery of penalties. against before any two justices, and on such summons the said
 two justices may hear and determine the matter of such complaint, and on proof of the offence convict the offender, and adjudge him to pay the penalty or forfeiture incurred, and proceed to recover the same, although no information in writing shall have been exhibited or taken by or before such justice ; and all such proceedings by summons without information shall be as effectual, to all intents and purposes, as if an information in writing was exhibited.

Witnesses who refuse to attend are liable to a penalty of 5*l.*—5 & 6 Will. 4, c. 50, s. 102. See form of summons in schedule to that act, No. 20, the General Highway Act, with notes, by Shelford, 2d ed. p. 208.

(*d*) See provisions as to railways which shall be constructed under any act passed after 8th May, 1845, 8 & 9 Vict. c. 20, s. 47.

Action
 against
 railway
 company for
 damage
 caused by
 not keeping
 gates closed.

(*e*) See 5 & 6 Vict. c. 55, s. 13, *post*, p. 29. The declaration stated that the railway of the defendants crossed a public highway on a level, yet the defendants disregarding their duty and the statutes in that behalf, did not keep gates across the said highway, at the point where the same is crossed by the railway, constantly closed, by reason whereof two horses of plaintiff, lawfully being on the highway near to the railway at the point aforesaid, went and escaped from the highway into and upon the railway, and were by a locomotive engine* and train of carriages of defendants, run over and killed. Plea, that the horses were not lawfully on the highway at the time when, &c. It appeared that the horses, which were grazing in the plaintiff's field, had leaped over the hedge into a turnpike road, and had strayed thence into a new road formed by the company leading across the railway on a level into an old highway, and one of the gates at the crossing being open, had got upon the railway :—It was held, first, that the road formed by the company was a highway, though

[*28]

the parish might not be bound to repair it. *Powcett v. York and North Midland Railway Company*, 15 Jur. 173 ; 20 L. J. Q. B. 222 ; 16 Q. B. 610. 5 & 6 VICT.
c. 55

It was held, secondly, that the defendants being required by their railway act, and by this section, to keep the gates at the crossings constantly closed, the horses were, as against the defendants, lawfully on the highway, and therefore the plaintiff was entitled to recover. *Ib.*

Fences.

X. And whereas it is expedient that further provision be made for the safety of the public in respect of the fences of railways ; be it enacted, that all railway companies shall be under the same liability of obligation to erect, and to maintain and repair, good and sufficient fences throughout the whole of their respective lines, as they would have been if every part of such fences had been originally ordered to be made under an order of justices by virtue of the provisions to that effect in the acts of parliament relating to such railways respectively. Railway
companies to
erect and
maintain
fences.

Common Terminus, or Rails in common.

XI. That where two or more railway companies, whose railways have a common terminus or a portion of the same line of rails in common, or which form separate portions of one continued line of railway communication, shall not be able to agree upon arrangements for conducting at such common terminus, or at the point of junction between them, their joint traffic with safety to the public, it shall be lawful for the lords of the said committee, upon the application of either of the parties, to decide the questions in dispute between them, so far as the same relate to the safety of the public, and to order and determine whether the whole or what proportion of the expenses attending on such arrangements shall be borne by either of the parties respectively ; and if any railway company shall refuse or wilfully neglect to obey any such order made upon or against such company by the lords of the said committee pursuant to this provision such company *shall forfeit to her majesty the sum of twenty pounds per day for every day during which such refusal or neglect shall continue ; and every such penalty may be recovered Disputes between connecting railways to be decided by the Board of Trade.

5 & 6 Vict. c. 55. in any of her majesty's courts of record, or in the courts of session or in any of the sheriff's courts in Scotland.

Regulation of Branch Communications.

Powers of making branch communication with railways, and of entering upon them with locomotive engines to be regulated by the Board of Trade

XII. And whereas powers of laying down branch lines opening in the ledges or flanches of main lines of railway, and of entering upon and passing along such main lines with carriages and waggons drawn by locomotive engines, or by other mechanical or animal power, and also power to form roads or railways across existing railways on a level, have been given by various acts relative to railways to the owners or occupiers of lands adjoining the railway, and to other persons with their consent : and whereas experience has shown that the exercise of such powers without limitation would in many cases be attended with danger to the public using such railway ; be it therefore enacted, that if, in the case of any railway on which passengers are conveyed by steam or other mechanical power, it shall appear to the lords of the said committee that such power as aforesaid cannot be so exercised without seriously endangering the public safety, and that an arrangement may be made with a due regard to existing rights of property, it shall be lawful for the lords of the said committee to order and direct that such powers shall only be exercised subject to such conditions as the lords of the said committee shall direct : provided always, that no railway shall be considered a passenger railway if two-thirds or more of the gross annual revenue of such railway shall be derived from the carriage thereon of coals, ironstone, or other metals or minerals.

Defining a passenger railway.

Railways crossing Turnpike Roads, &c.

Alteration of dangerous level crossings.

XIII. And whereas in many cases railways have been made to cross turnpike roads, highways and private roads and tramways on the level, and the companies to whom such railways belong would in some cases be willing at their own expense, to carry such roads and tramways over or under such railways by means of a bridge or archway for the greater safety of the public, but have no authority so to do : and whereas it would promote the public safety if railway companies were enabled, under the sanction and authority of the *lords of the said committee, to substitute bridges or archways for such level crossings as aforesaid ; be it therefore

enacted, that in all cases where any railway company shall be willing, at their own expense, to carry any turnpike road highway or private road or tramway over or under their railway by means of a bridge or arch in lieu of crossing the same on the level, it shall be lawful for the lords of the said committee, on the application of the said company, and after hearing the several parties interested, if it shall appear to the lords of the said committee that such level crossing endangers the public safety, and that the proposal of the company does not involve any violation of existing rights or interests without adequate compensation, to give the said company full power and authority for removing the danger at their own expense, either by building a bridge, or by such other arrangement as the nature of the case shall require, subject to such conditions as the lords of the said committee shall direct.

5 & 6 VICT.
c. 55.

Entry on lands to repair Accidents.

XIV. And whereas it is essential for the public safety, and also for the proper maintenance of railways in a state of efficiency for the public service, that railway companies should have the power, in case of accidents or slips happening or being apprehended to their cuttings and embankments or other works, to enter upon the lands adjoining their respective railways, for the purpose of repairing or renewing the same, and to do such works as may be necessary for the purpose ; be it therefore enacted, that it shall be lawful for the lords of the said committee to empower any railway company, in case of any accident or slip happening or being apprehended to any cutting, embankment or other work belonging to them, to enter upon any lands adjoining their railway for the purpose of repairing or preventing such accident, and to do such works as may be necessary for the purpose : provided always, that in case of necessity it shall be lawful for any railway company to enter upon such lands and do such works as aforesaid, without having obtained the previous sanction of the lords of the said committee ; but in every such case such railway company shall, within forty-eight hours after such entry, make a report to the lords of the said committee, specifying the nature of such accident or apprehended accident, and of the works necessary to be done, and

Power for
railway com-
panies to
enter upon
adjoining
lands to re-
pair acci-
dents.

5 & 6 VICT.
c. 55.

[*31]

such powers shall *cease and determine if the lords of the said committee shall, after considering the said report, certify that their exercise is not necessary for the public safety : provided also, that such works shall be as little injurious to the said adjoining lands as the nature of the accident or the apprehended accident will admit of, and shall be executed with all possible despatch ; and full compensation shall be made to the owners and occupiers of such lands for the loss or injury or inconvenience sustained by them respectively by reason of such works, the amount of which compensation, in the case of any dispute about the same, shall be settled in the same manner as cases of disputed compensation are directed to be settled by the acts relating to the railway on which such works may become necessary : provided always, that no land shall be taken permanently by any railway company for such works without a certificate from the lords of the said committee as hereinafter described.

Extension of compulsory Power to take Lands.

Compulsory powers of taking land for the purpose of railways extended where thought necessary for safety by the Board of Trade.

XV. And whereas by various acts relating to railways compulsory powers are given to railway companies of purchasing and taking lands for the construction of such railways, and it is provided that such compulsory powers shall not be exercised after the expiration of certain limited periods from the passing of the said acts (*f*): and whereas it is sometimes found necessary for the public safety that additional land should be taken after the expiration of such periods for the purpose of giving increased width to the embankments and inclination to the slopes of railways, or for making approaches to bridges or archways, or for doing such works for the repair or prevention of accidents as are hereinbefore described ; be it therefore enacted, that, in every case in which the lords of the said committee shall certify that the public safety requires additional land to be taken by any railway company for such purpose as aforesaid, the compulsory powers of purchasing and taking land contained in the act or acts of such railway company, together with all the clauses and provisions relative thereto, shall, as regards such portion or portions of land as are mentioned in the certificate of the lords of the said committee, revive and be in full force for such further period as shall be mentioned in

such certificate (g): provided always, that any railway company applying to the lords of the said committee for any such certificate *shall give fourteen days notice in writing, in the manner prescribed by the act or acts of such company for serving notices on landowners, of their intention to make such application to all the parties interested in such lands, or such of them as shall be known to the company, and shall state in such notice the particulars of the lands required; and if any of such parties interested shall apply within the said period of fourteen days to the lords of the said committee, such party shall be heard by them before any such certificate is given: provided also, that where any such application shall have been made by any railway company to the lords of the said committee, upon which application any such certificate shall have been refused, the directors of such railway company shall, if required by the lords of the said committee, repay to the party resisting such application any expenses which he or they may have incurred in resisting such application.

5 & 6 Vict.
c. 55.

[32*]

(f) See 8 & 9 Vict. c. 18, s. 123.

(g) Where a slip took place on the line of railway, and the company thereupon entered upon the adjoining land and began digging without permission, and without subsequently reporting the same to the Board of Trade, this was ruled to be within the above section; but it being proved by affidavit that the steps taken by the company were necessary for the public safety, and there having been a subsequent treating between the parties, an injunction was refused upon the company paying into court a certain sum of money; *Tower v. Eastern Counties Railway Company*, 3 Railw. C. 381. In an application to the Board of Trade under this act, a question was raised whether land required for the purpose of throwing to spoil the earth cut away in the process of widening slopes came within the meaning of this section of this act; but as it appeared from the report of the inspector general, that the creation of a spoil bank in the vicinity of the cutting was, in the case in question, essential for the public safety, and, in fact, part and parcel of the integral process of

5 & 6 VICT.
c 55.

widening the slope, it was considered that the clause fully warranted the extension of the certificate to all the land required. Report of Officers of Railway Department, 1842, p. 21.

Weight of Carriages used on Railways.

Carriages of
greater
weight than
four tons
may be used
on railways.

[33*]

XVI. And whereas by various acts relating to railways it is enacted, that no carriage or waggon shall carry or bear at any one time upon the railway (including the weight of such carriage) more than four tons, and experience has shown that it is in many cases more conducive to safety to use a heavier description of carriage or waggon upon railways than *was originally contemplated; be it therefore enacted that every provision contained in any such act or acts respectively limiting the weight to be carried or borne at any one time in any carriage or waggon upon any railway (including the weight of such carriage or waggon) to four tons shall be and the same is hereby repealed, and that, notwithstanding anything in any act contained, shall be lawful for any railway company to use and to permit to be used upon any railway carriages or waggons carrying or bearing (including the weight of such carriage) a greater weight than four tons, subject to such regulations as may from time to time be made and be in force pursuant to any act or acts of parliament already or hereafter to be passed in that behalf.

Police Regulations.

Punishment
of persons
employed on
railways
guilty of mis-
conduct.

XVII. And whereas by the said recited act for regulating railways provision is made for the punishment of servants of railway companies guilty of misconduct, and it is expedient to extend such provision (*h*); be it enacted, that it shall be lawful for any officer or agent of any railway company, or for any special constable duly appointed, and all such persons as they may call to their assistance, to seize and detain any engine driver, waggon driver, guard, porter, servant or other person employed by the said or by any other railway company or by any other company or person, in conducting traffic upon the railway belonging to the said company, or in repairing and maintaining the works of the said railway, who shall be found drunk while so employed upon the said rail-

5 & 6 VICT.
c. 55.

way, who shall commit any offence against any of the by-laws, rules or regulations of the said company, or who shall wilfully, maliciously or negligently do or omit to do any act whereby the life or limb of any person passing along or being upon such railway or the works thereof respectively shall be or might be injured or endangered, or whereby the passage of any engines, carriages or trains shall be or might be obstructed or impeded, and to convey such engine driver, guard, porter, servant or other person so offending, or any person counselling, aiding or assisting in such offence, with all convenient despatch before some justice of the peace for the place within which such offence shall be committed, without any other warrant or authority than this act; and every such person so offending, and every person counselling, aiding or *assisting therein as aforesaid, shall, when convicted upon the oath of one or more credible witness or witnesses before such justice as aforesaid (who is hereby authorized and required, upon complaint to him made upon oath, without information in writing, to take cognizance thereof, and to act summarily in the premises,) in the discretion of such justice, be imprisoned, with or without hard labor, for any term not exceeding two calendar months, or, in the like discretion of such justice, shall for every such offence forfeit to her majesty any sum not exceeding ten pounds, and in default of payment thereof shall be imprisoned, with or without hard labor, as aforesaid, for such period, not exceeding two calendar months, as such justice shall appoint, such commitment to be determined on payment of the amount of the penalty; and every such penalty shall be returned to the next ensuing court of quarter sessions in the usual manner.

[*34]

(h) See 3 & 4 Vict. c. 97, s. 13, *ante*, p. 17.

XVIII. That in all cases in which by the present or the said recited act for regulating railways it is provided that offenders shall be taken before one or more justices of the peace for the place within which the offence was committed, it shall be lawful, in case the offence is committed in Scotland, to take such offenders before the sheriff of the county, or other magistrate acting for the district within which such offence shall be committed, or where such offender shall be apprehended, without any warrant or authority other than

Sheriffs to
have juris-
diction in
Scotland.

5 & 6 Vict. c. 55. this act; and such sheriff or magistrate is hereby empowered and required, on the application of the railway company, to proceed in all respects as if the words "sheriff or magistrate" had been substituted for the word "justice" in the said acts, and shall be entitled summarily, and without a jury, to execute the powers thereby and hereby committed to him (i).

(i) See 3 & 4 Vict. c. 97, s. 14, *ante*, p. 18.

Notices to and from the Board of Trade.

Communications to and from the Board of Trade, and service of notice &c. on railway company.

[*35]

XIX. That all notices, returns, and other documents required by this act or by the said recited act to be given to or laid before the lords of the said committee shall be delivered at or sent by the post to the office of the lords of the said committee; and all notices, requisitions, orders, regulations, appointments, *certificates, certified copies and other documents in writing, signed by one of the secretaries of the said committee, or by some officer appointed for that purpose by the lords of the said committee, and purporting to be made by the lords of the said committee, shall, for the purposes of this and of the said recited act, be deemed to have been made by the lords of the said committee, and that in the absence of evidence to the contrary, without proof of the authority of the person signing the same or of the signature thereto; and service of the same at one of the terminal offices of any railway company on the secretary or clerk of the said company, or by sending the same by post addressed to him at such office, shall be deemed good service upon the said company (k).

(k) See 3 & 4 Vict. c. 97, s. 20, *ante*, p. 21; 7 & 8 Vict. c. 85, s. 23.

Conveyance of Military and Police Forces.

Railway companies shall convey military and police forces at prices to be settled

XX. That whenever it shall be necessary to move any of the officers or soldiers of her majesty's forces of the line, ordnance corps, marines, militia or the police force, by any railway, the directors thereof shall and are hereby required to permit such forces respectively, with their baggage, stores, arms, ammunition and other necessaries and things, to be conveyed at the usual hours of starting, at such prices or upon such conditions as may from time to time be contracted for between the secretary at war and such railway companies

for the conveyance of such forces, on the production of a route ^{5 & 6 Vict.} or order for their conveyance signed by the proper authorities ^{c. 55.} (*l*).

(*l*) This provision is amended and extended by 7 & 8 Vict. c. 85, s. 12, *post*, p. 45. This provision is analogous to that in the Mutiny Act. The rapid conveyance of troops from one part of the country to another, is occasionally an object of great national importance; and for this purpose provision is annually made in the Mutiny Act, whereby, in cases of emergency, "all justices are required within their several jurisdictions to issue their warrants for the provision not only of waggons, wains, carts, and cars, kept by or belonging to any person, and for any use whatsoever; but also of saddle horses, coaches, post chaises, chaises, and other four-wheeled carriages kept for hire, and also of boats, barges, and other vessels, used for the transport of any commodities whatever upon any canal or navigable river."

*XXI. That whenever the word "railway" is used in this [^{*36}] or in the said recited act it shall be construed to apply to all railways used or intended to be used for the conveyance of passengers in or upon carriages drawn or impelled by the power of steam or by any other mechanical power; and whenever the word "company" is used in this or in the said recited act, it shall be construed to extend to and include the proprietors for the time being of any such railway, whether a body corporate or individuals, and their lessees, executors, administrators and assigns, unless in either of the above cases the subject or context be repugnant to such construction (*m*). Meaning of the words "railway" and "company."

(*m*) See 3 & 4 Vict. c. 97, s. 21, *ante*, p. 22.

XXII. That all penalties under this act, for the application of which no special provision is made, shall be recovered in the name and for the use of her majesty, in the manner provided by the said recited act for regulating railways (*n*). Application of penalties.

(*n*) 3 & 4 Vict. c. 97, s. 6, *ante*, p. 15.

[*37]

*GENERAL REGULATION OF RAILWAYS.

7 & 8 VICTORIA, c. 85.

7 & 8 VICT. *An Act to attach certain Conditions to the Construction of*
c. 85. *future Railways authorized or to be authorized by an*
Act of the present or succeeding Sessions of Parliament;
and for other purposes in relation to Railways.

[9th August, 1844.]

Revision of Scale of Tolls.

If, after
 twenty-one
 years from
 the passing
 of the act for
 the construc-
 tion of any
 future rail-
 way, the
 profits shall
 exceed 10l.
 per cent.,
 the treasury
 may revise
 the scale of
 tolls, and fix
 a new scale.

WHEREAS it is expedient that the concession of powers for the establishment of new lines of railway should be subjected to such conditions as are hereinafter contained for the benefit of the public: be it enacted, that if at any time after the end of twenty-one years from and after the first day of January next after the passing of any act of the present or of any future session of parliament for the construction of any new line of passenger railway, whether such new line be a trunk, branch, or junction line, and whether such new line be constructed by a new company incorporated for the purpose or by any existing company, the clear annual profits divisible upon the subscribed and paid-up capital stock of the said railway, upon the average of the three then last preceeding years shall equal or exceed the rate of ten pounds for every hundred pounds of such paid-up capital stock, it shall be lawful for the lords commissioners of her majesty's treasury, subject to the provisions hereinafter contained, upon giving to the said company three calendar months' notice in writing of their intention so to do, to revise the scale of tolls, fares, and charges limited by the act or acts relating to the said railway, and to fix such new scale of tolls, fares and charges applicable to such different classes and kinds of passengers, goods, and other traffic on such railway, as in the judgment of the said lords commissioners, assuming the same quantities and kinds of traffic to continue, shall be likely to reduce the said divisible profits to the said rate of ten pounds in the hundred: provided always, that no such revised scale shall take effect,

Proviso.

unless accompanied by a guarantee to subsist as long as any such revised scale of tolls, fares, and charges * shall be in force, that the said divisible profits, in case of any deficiency therein, shall be annually made good to the said rate of ten pounds for every hundred pounds of such capital stock; provided also, that such revised scale shall not be again revised or such guarantee withdrawn, otherwise than with the consent of the company, for the further period of twenty-one years.

7 & 8 VICT.
c. 85.

[*38]

Purchase of Railways by Government.

II. That whatever may be the rate of divisible profits on any such railway it shall be lawful for the said lords commissioners, if they shall think fit, subject to the provisions hereinafter contained, at any time after the expiration of the said term of twenty-one years, to purchase any such railway with all its hereditaments, stock, and appurtenances, in the name and on behalf of her majesty, upon giving to the said company three calendar months' notice in writing of their intention, and upon payment of a sum equal to twenty-five years' purchase of the said annual divisible profits, estimated on the average of the three then next preceding years: provided that if the average rate of profits for the said three years shall be less than the rate of ten pounds in the hundred, it shall be lawful for the company, if they shall be of the opinion that the said rate of twenty-five years' purchase of the said average profits is an inadequate rate of purchase of such railway, reference being had to the prospects thereof, to require that it shall be left to arbitration, in case of difference, to determine what (if any) additional amount of purchase money shall be paid to the said company: provided also, that such option of purchase shall not be exercised, except with the consent of the company, while any such revised scale of tolls, fares, and charges shall be in force.

Option of
purchase of
future rail-
ways.

Proviso.

III. Provided always, and be it enacted, that the option of revision or purchase shall not be applied to any railway made or authorized to be made by any act previous to the present session; and that no branch or extension of less than five miles in length of any such line of railway shall be taken to be a new railway within the provisions of this act: and that

Existing
railways not
to be sub-
jected to the
options.

7 & 8 VICT.
c. 85

the said option of purchase shall not be exercised as regards any branch or extension of any railway, without including such railway in the purchase, in case the proprietors thereof shall require that the same be so included.

(*39)

Reservation
to parliament
of the
consideration
of future
policy in
regard to the
said options.

IV. And whereas it is expedient that the policy of *revision or purchase should in no manner be prejudged by the provisions of this act, but should remain for the future consideration of the legislature, upon grounds of general and national policy: and whereas it is not the intention of this act that under the said powers of revision or purchase, if called into use, the public resources should be employed to sustain an undue competition against any independent company or companies; be it enacted, that no such notice as hereinbefore mentioned, whether of revision or purchase, shall be given until provision shall have been made by parliament, by an act or acts to be passed in that behalf, for authorizing the guarantee or the levy of the purchase money hereinbefore mentioned, as the case may be, and for determining, subject to the conditions hereinbefore mentioned, the manner in which the said options or either of them shall be exercised; and that no bill for giving powers to exercise the said options, or either of them, shall be received in either house of parliament unless it be recited in the preamble to such bill that three months' notice of the intention to apply to parliament for such powers has been given by the said lords commissioners to company or companies to be affected thereby.

Accounts to
be kept, and
to be open to
inspection.

V. That from and after the commencement of the period of three years next preceeding the period at which the option of revision or purchase becomes available, full and true accounts shall be kept of all sums of money received and paid on account of any railway within the provisions hereinbefore contained (distinguishing, if the said railway shall be a branch railway or worked in common with other railways, the receipts, and giving an estimate of the expenses on account of the said railway, from those on account of the trunk line, or other railways,) by the directors of the company to whom such railway belongs or by whom the same may be worked; and every such railway company shall once in every half year during the said period of three years cause a half-yearly account in abstract to be prepared, showing the total re-

ceipt and expenditure on account of the said railway for the half year ending the thirtieth day of June and the thirty-first day of December respectively, or such other convenient days as shall in each case be directed by the said lords commissioners, under distinct heads of receipts and expenditure, with a statement of the balance of such account, duly audited and certified under the hands of two or more directors of the said railway company, and shall send a copy of the said *account to the said lords commissioners on or before the last days of August and February respectively, or such other days as shall in each case be directed by the said lords commissioners, in each year; and it shall be lawful for the said lords commissioners, if and when they shall think fit, to appoint any proper person or persons to inspect the accounts and books of the said company during the said period of three years; and it shall be lawful for any person so authorized, at all reasonable times, upon producing his authority, to examine the books, accounts, vouchers and other documents of the company at the principal office or place of business of the company, and to take copies or extracts therefrom.

7 & 8 Vict.
c. 85.

[*40]

Provisions as to Cheap Trains.

VI. And whereas it is expedient to secure to the poorer class of travelers the means of traveling by railway at moderate fares, and in carriages in which they may be protected from the weather; be it enacted, that on and after the several days hereinafter specified, all passenger railway companies which shall have been incorporated by any act of the present session, or which shall be hereafter incorporated, or which by any act of the present or any future session have obtained or shall obtain, directly or indirectly, any extension or amendment of the powers conferred on them respectively by their previous acts, or have been or shall be authorized to do any act unauthorized by the provisions of such previous acts, shall, by means of one train at the least to travel along their railway from one end to the other of each trunk, branch or junction line belonging to or leased by them, so long as they shall continue to carry other passengers over such trunk, branch or junction line, once at the least each way on every week day, except Christmas day and Good Friday (such exception not to extend to Scotland), provide

Companies
to provide
one cheap
train each
way daily.

7 & 8 VICT.
c. 85.

for the conveyance of third class passengers to and from the terminal and other ordinary passenger stations of the railway, under the obligations contained in their several acts of parliament, and with the immunities applicable by law to carriers of passengers by railway ; and also under the following conditions ; (that is to say,)

Such train shall start at an hour to be from time to time fixed by the directors, subject to the approval of the lords of the committee of privy council for trade and plantations :

[*41] *Such train shall travel at an average rate of speed not less than twelve miles an hour for the whole distance traveled on the railway, including stoppages :

Such train shall, if required, take up and set down passengers at every passenger station which it shall pass on the line :

The carriages in which passengers shall be conveyed by such train shall be provided with seats, and shall be protected from the weather, in a manner satisfactory to the lords of the said committee :

The fare or charge for each third class passenger by such train shall not exceed one penny for each mile travelled :

Each passenger by such train shall be allowed to take with him half a hundred weight of luggage, not being merchandise or other articles carried for hire or profit, without extra charge ; and any excess of luggage shall be charged by weight, at a rate not exceeding the lowest rate of charge for passengers' luggage by other trains :

Children under three years of age accompanying passengers by such train shall be taken without any charge ; and children of three years and upwards, but under twelve years of age, at half the charge for an adult passenger.

And with respect to all railways subject to these obligations which shall be open on or before the first day of November next, these obligations shall come into force on the said first day of November ; and with respect to all other railways subject to these obligations, they shall come into force on the day of opening of the railway, or the day after the last day of the session in which the act shall be passed by reason of

which the company will become subject thereunto, which shall first happen (a). 7 & 8 VICT.
c. 85.

(a) The justice and expediency of providing cheap trains for the laboring and poorer class of travelers is obvious, as railway communication had superseded and in many cases destroyed the conveyance by means of waggons, vans and carts, which afforded a cheap though dilatory mode of traveling to the laborer and his family.

VII. That if any railway company shall refuse or wilfully neglect to comply with the provisions of this act as to the said cheap trains within a reasonable time, or shall attempt to evade the operation of such order, such company shall forfeit to her majesty a sum not *exceeding twenty pounds for every day during which such refusal, neglect or evasion shall continue. Penalty for
non-compliance.
[*42]

VIII. Provided always and be it enacted, that except as to the amount of fare or charge for each passenger by such cheap trains, which shall in no case exceed the rates hereinbefore in such case provided, the lords of the said committee shall have a discretionary power upon the application of any railway company, of dispensing with any of the conditions hereinbefore required in regard to the conveyance of passengers by such cheap trains as aforesaid, in consideration of such other arrangements, either in regard to speed, covering from the weather, seats or other particulars, as to the lords of the said committee shall appear more beneficial and convenient for the passengers by such cheap trains under the circumstances of the case and shall be sanctioned by them accordingly; and any railway company which shall conform to such other conditions as shall be so sanctioned by the lords of the said committee shall not be liable to any penalty for not observing the conditions which shall have been so dispensed with by the lords of the said committee in regard to the said cheap trains and the passengers conveyed thereby. Board of
Trade to
have a dis-
cretionary
power of
allowing
alternative
arrange-
ments.

IX. That no tax shall be levied upon the receipts of any railway company from the conveyance of passengers at fares not exceeding one penny for each mile by any such cheap train as aforesaid (b). When no tax
to be levied.

(b) The statute 5 & 6 Vict. c. 79, s. 1, enacts, that there Tax on rail-

7 & 8 Vict. c. 85. shall be levied throughout Great Britain in respect of the passengers conveyed upon any railway, the duties specified in the schedule to that act. 5 & 6 Vict. c. 79, ss. 1, 2.

way passengers.

The schedule to the acts states that the duties in respect of passengers conveyed for hire by carriages traveling upon railways shall be as follows, viz., for and in respect of all passengers conveyed for hire upon or along any railway, a duty at and after the rate of 5*l.* for 100*l.* upon all sums received or charged for the hire, fare or conveyance of all such passengers.

Duties in respect of railway passengers transferred to commissioners of excise.

By 10 & 11 Vict. c. 42, s. 1, after the 5th of September, 1847, the duties granted and then payable under the act 5 & 6 Vict. c. 79, for and in respect of passengers conveyed upon railways, are transferred to and placed under the management of the commissioners of excise for the time being, and such duties are henceforth to be denominated duties of excise, and to be raised, levied, collected and accounted for by and under the authority of the commissioners of excise and their officers.

[*43]

Accounts of money received for passengers.

The proprietor or company of proprietors of every railway *in Great Britain, and every other person who shall carry or convey, or cause to be carried or conveyed, any passenger for hire in or upon any railway in Great Britain, are required to keep accounts of the money received for the conveyance of passengers upon railways, and of money paid by the persons carrying such passengers to the proprietors of railways, on account of fares received, or for the use of the railway. Copies of the accounts are to be delivered to the commissioners of excise, verified by affidavit, and duties paid thereon monthly. 5 & 6 Vict. c. 79, s. 4; 10 & 11 Vict. c. 42, s. 5.

Where there shall be no express contract or agreement between the parties to the contrary, any such proprietor or company may deduct out of the monies to be paid over to any such other proprietor or company as aforesaid, the amount of the duties chargeable thereon, and which such proprietor or company receiving such moneys shall have paid or be liable to pay. 5 & 6 Vict. c. 79, s. 5.

All the books of every such proprietor or company or other person, in which any account relating to such passengers, or to the money received or charged for the hire, fare or conveyance of the same, or to any money received from or paid or accounted for to any other proprietor or company for such hire, fare or conveyance as aforesaid, or a proportion thereof, or as or for such tools as aforesaid, shall be entered or kept, shall be open for the inspection and examination at all reasonable times of any officer or officers of excise, authorized by the excise in that behalf; and every such officer shall be at liberty to take copies of or extracts from any such book or account as aforesaid; the penalty for refusing to permit inspection is fifty pounds. 5 & 6 Vict. c. 79, s. 6; 10 & 11 Vict. c. 42, s. 2.

The proprietor or company of proprietors of every such railway, and every other person, before any passengers shall be conveyed or caused to be conveyed by him or them on any railway as aforesaid, are required to give security by bond to the crown for securing the duties. Every such bond shall be taken with sufficient sureties to the satisfaction of the commissioners of excise, and in such sum as the said commissioners may judge to be reasonable and proper; and every such security shall be renewed from time to time, whenever and so often as such bond shall be forfeited, or as the parties to the same or any of them shall die, or become bankrupt or insolvent, or reside in parts beyond the seas, and also whenever and so often as the said commissioners shall in their discretion require the same to be renewed. The proprietor or company of proprietors of any such railway, or other persons as aforesaid, are liable to penalties for not observing the provisions of this act. 5 & 6 Vict. c. 79, s. 7. See 10 & 11 Vict. c. 42, s. 3.

Security for
tax to be
given.

The duties by the acts (1 & 2 Will. 4, c. lxxvi, and 1 & 2 Vict. c. ci) authorized to be levied upon coals, culm and cinders contained in any ship or vessel arriving at her moorings, *within any part of the port of London, at or to the west-

Duties on
coals ex-
tended to
coals brought
by railway.

[*44]

7 & 8 Vict.
c. 85.

ward of Gravesend, or brought near London by the Grand Junction or Paddington Canals, or by the river Thames, and by other acts then in force, authorized to be levied upon coals, culms and cinders brought near London by certain railways in the same acts particularly mentioned, and shall extend and be authorized to be levied until the 5th day of July, 1862, upon all coals, culm and cinders brought to any place within the port of London, or within the cities of London and Westminster and the borough of Southwark, or to any place within the distance of twenty miles from the General Post Office, in the city of London, *by any railway already constructed or hereafter to be constructed* or by inland navigation, or by any other mode of conveyance; and the same duties shall be payable to such person or persons, at such place or places, in such manner and under such regulations, as the lord mayor, aldermen and commons of the city of London, in common council assembled, shall from time to time direct or appoint, with the same powers and authorities for giving receipts for and for enforcing or recovering payment of the same as are given by the acts (1 & 2 Will. 4, c. lxxvi, and 1 & 2 Vict. c. ci,) in respect of the like duty on coals, culm and cinders by the same act authorized to be levied. Any railway company, their workmen and agents, or other persons using their railways may bring by such railways to any points of the said railways nearer to London than the aforesaid distance, all such quantities of coal and coke from time to time as shall be required to be used, and shall be *bona fide* used, for the purpose of the engines of the said company, not exceeding 500 tons in any one year, without any duty being payable in respect of such coal or coke. But if any coal or coke brought nearer to London than the aforesaid distance without the duty being paid in respect thereof, according to the provisions of the act, shall be used otherwise than for the purposes of the engines of the said company, or more than 500 tons of such coal or coke shall be so brought in any one year without the duty being paid in respect thereof as aforesaid, every such company shall, in

Coals, not exceeding 500 tons in a year, may be brought duty free, for use of engines on railways.

Penalty on railways for bringing more than prescribed quantity of coals.

either of such cases, for every ton of such coal or coke so brought and otherwise used, or for every ton of such coal or coke exceeding 500 tons in any one year (as the case may be), forfeit and pay to the said mayor and commonalty and citizens the sum of one hundred pounds, to be recovered by action of debt, bill, plaint or information, in any of her majesty's courts of record at Westminster. (8 & 9 Vict. c. 101, s. 2.)

7 & 8 VICT.
c. 85.

[44]

Patent fuel, an article composed of coal dust mixed with 13 per cent, of pitch and lime, is not liable to the duties imposed on coal imported into the port of London by the above acts, notwithstanding that there is no purpose to which ordinary pit coal can be applied, to which coal dust without the admixture of pitch and lime could not also be applied. (*Mayor &c. of London v. Parkinson*, 10 C. B. 228.) (1.)

(1) In Maine where a Rail Road Company was authorized to procure, and hold in fee lands, necessary to transact the business of the Road, and the stock was to be divided into a certain number of shares "to be holden, and considered, as personal estate;" it was held, that the real estate owned and used by the company, either as a Rail Road or Depot was not subject to taxation, otherwise than as personal property, unless the Legislature should specifically prescribe differently. *Bangor & Piscataquis Railroad Company, vs. Harris*, 8 Shepley, 533.

Of the taxation of the property of Rail Road Companies.

In New York Rail Roads are to be taxed according to the value of their real estate; and in the towns through which they pass; not upon their capital stock. *The people vs. Supervisors of Niagara*, 4 Hill 20.

In Pennsylvania it was held that such property of a Rail Road, as is indispensable to the construction and use of a Rail Road, is alone exempt from taxation; but property which is only indispensable to the making of profits is taxable. *Rail Road vs. Berks County*, 6 Barr, 70.

Thus, water stations and depots are exempt from taxation, the latter including offices, oil houses, car houses, but ware houses, coal lots, coal shutes, machine shops, wood yards, &c., are not exempt. *Id.*

7 & 8 Vict.
c. 85.

In Maryland; it was held that the charter of the Baltimore and Ohio Rail Road Comp.; act of 1826, ch. 123, sec. 18, which declares that the shares of the capital stock, of that company shall be considered personal assets, and exempt from taxation; excluded the right of the State to tax that stock, and the right of all corporations created by the State to tax it, by reason of the comprehensive and universal terms of the exemption. *Mayor &c., of Baltimore vs. Balt. & Ohio Rail Road Company*, 6 Gill 288.

The specific property of a corporation is as much an ingredient in the shares of its stock, and a component part of their value, as is any portion of their corporate property. *Ib.*

The right to tax the stock, or the specific property of the Baltimore and Ohio Rail Road Company was not re-invested in the State by the act of 1835, chap. 395, sec. 15. *Ib.*

[*45]
Where companies run trains on the Sunday, cheap trains to be likewise provided.

X. That whenever any railway company subject to the herein-before mentioned obligation of running cheap trains shall, from and after days herein-before specified on which the said obligations are to accrue, run any train or trains on Sundays for the conveyance of passengers, it shall, under the obligations contained in its act or acts of parliament, and with the immunities applicable by law to carriers of passengers by railway, by such train each way, on every Sunday, as shall stop at the greatest number of stations, provide sufficient carriages for the conveyance of third class passengers at the terminal and other stations at which such Sunday train may ordinarily stop; and the fare or charge for each third class passenger by such train shall not exceed one penny for each mile traveled.

Railway companies to afford additional facilities for the transmission of the mails.
1 & 2 Vict.
c. 98.

XI. And whereas by an act passed in the second year of the reign of her majesty, entitled "An Act to provide for the Conveyance of the Mails by Railways," provision was made for the transmission of the Mails by railway, and it is expedient that such provision should be extended (*b*); be it enacted, that it shall be lawful for the postmaster-general to require in the manner and subject to the conditions as to payment for service performed prescribed by the said act, that the mails be forwarded upon any such railway as is herein-before last mentioned at any rate of speed which the inspector general of railways for the time being shall certify to be safe, not exceeding twenty-seven miles in the hour including stop-

pages; and it shall be also lawful for the postmaster-general to send any mail guard with bags not exceeding the weight of luggage allowed to any other passenger (or subject to the general rules of the company for any excess of that weight) by any trains other than a mail train, upon the same conditions as any other passenger; provided that in such last mentioned case nothing herein or in the last-recited act contained shall be construed to authorize the postmaster-general to require the conversion of a regular mail train into an ordinary train, or to exercise any control over the company in respect of any ordinary train, nor shall the company be responsible for the safe custody or delivery of any mail bags so sent.

7 & 8 Vict.
c. 85.

(b) See *ante*, pp. 1—13.

**Conveyance of Military and Police Forces.*

[*46]

XII. And whereas by an act passed in the sixth year of the reign of her majesty, entitled "An Act for the better Regulation of Railways, and for the Conveyance of Troops," it was among other things enacted, that whenever it shall be necessary to move any of the officers or soldiers of her majesty's forces of the line, ordnance corps, marines, militia, or the police force, by any railway, the directors thereof shall and are hereby required to permit such forces respectively, with their baggage, stores, arms, ammunition, and other necessities and things to be conveyed at the usual hours of starting, at such prices or upon such conditions as may from time to time be contracted for between the secretary at war and such railway companies for the conveyance of such forces, on the production of route or order for their conveyance signed by the proper authorities: and whereas it is expedient to amend such provision in regard to the prices and conditions of conveyance by any new railway or any railway obtaining new powers from parliament; be it enacted, that all railway companies which have been or shall be incorporated by any act of the present or any future session, or which by any act of the present or any future session shall have obtained or shall obtain any extension or amendment of the powers conferred by their previous acts or any of them, or have been or shall be authorized to do any act unauthorized by the provisions of such previous acts, shall be bound to provide such convey-

Certain companies to convey military and police forces at certain charges, 5 & 6 Vict. c. 55, s. 20. *ante*, p. 35.

7 & 8 VICT.
c. 85.

[*47]

ance as aforesaid for the said military, marine and police forces at fares not exceeding two-pence per mile for each commissioned officer proceeding on duty, such officer being entitled to conveyance in a first class carriage, and not exceeding one penny for each mile for each soldier, marine, or private of the militia or police force, and also for each wife, widow or child above twelve years of age of a soldier entitled by act of parliament or by competent authority to be sent to their destination at the public expense, children under three years of age, so entitled being taken free of charge, and children of three years of age or upwards, but under twelve years of age, so entitled, being taken at half the price of an adult; and such soldiers, marines and privates of the militia or police force, and their wives, widows and children so entitled, being conveyed in carriages which shall be *provided with seats with sufficient space for the reasonable accommodation of the persons conveyed, and which shall be protected against the weather; provided that every officer conveyed shall be entitled to take with him one hundred weight of personal luggage without extra charge, and every soldier, marine, private, wife, or widow shall be entitled to take with him or her half a hundred weight of personal luggage without extra charge, all excess of the above weights of personal luggage being paid for at the rate of not more than one half-penny per pound, and all public baggage, stores, arms, ammunition, and other necessities and things, (except gunpowder and other combustible matters, which the company shall only be bound to convey at such prices and upon such conditions as may be from time to time contracted for between the secretary at war and the company,) shall be conveyed at charges not exceeding two pence per ton per mile, the assistance of the military or other forces being given in loading and unloading such goods.

Provisions as to Electrical Telegraphs.

Companies
to allow lines
of electrical
telegraph to
be estab-
lished.

XIII. And whereas electrical telegraphs have been established on certain railways, and may be more extensively established hereafter, and it is expedient to provide for their due regulation; be it enacted, that every railway company, on being required so to do by the lords of the said committee, shall be bound to allow any person or persons authorized by the lords of the said committee, with servants and workmen, at all reasonable times to enter into or upon their lands, and

to establish and lay down upon such lands adjoining the line of such railway a line of electrical telegraph for her majesty's service, and to give to him and them every reasonable facility for laying down the same, and for using the same for the purpose of receiving and sending messages on her majesty's service, subject to such reasonable remuneration to the company as may be agreed upon between the company and the lords of the said committee, or in case of disagreement, as may be settled by arbitration; provided always, that, subject to a prior right of use thereof for the purposes of her majesty, such telegraph may be used by the company for the purposes of the railway, upon such terms as may be agreed upon between the parties, or, in the event of difference, as may be settled by arbitration.

7 & 8 VICT.
c. 85.

[*48]

*XIV. That where a line of electrical telegraph shall have been established upon any railway by the company to whom such railway belongs, or by any company, partnership, person or persons, otherwise than exclusively for her majesty's service, or exclusively for the purposes of the railway, or jointly for both, the use of such electrical telegraph for the purpose of receiving and sending messages, shall, subject to the prior right of use thereof for the service of her majesty and for the purpose of the company, and subject also to such equal charges and to such reasonable regulations as may be from time to time made by the said railway company, be open for the sending and receiving of messages by all persons alike, without favor or preference.

Electrical telegraph established by private parties to be open to the public.

Inspection of Railways.

XV. And whereas by an act passed in the fourth year of the reign of her majesty, entitled "An Act to regulate Railways," power is given to the lords of the said committee to appoint any proper person or persons to inspect any railway, and the stations, works and buildings, and the engines and carriages belonging thereto (c), and in order to carry the provisions of the act into execution it is expedient that the said power be extended; be it enacted, that the said power given to the lords of the said committee of appointing proper persons to inspect railways, shall extend to authorize the appointment by the lords of the said committee of any proper person or persons, for such purpose of inspection as are by the said act authorized, and also for the purpose of enabling

Appointment of inspectors by Board of Trade, 3 & 4 Vict. c. 97.

7 & 8 Vict
c. 85. — the lords of the said committee to carry the provisions of this and of the said act and of any general act relating to railways into execution : and that so much of the last recited act as provides that no person shall be eligible to the appointment as inspector who shall, within one year of his appointment, have been a director, or have held any office of trust or profit under any railway company, shall be repealed : provided always, that no person to be appointed as aforesaid shall exercise any powers of interference in the affairs of the company.

(c) See 3 & 4 Vict. c. 85, s. 5, *ante*, p. 14.

Repealing
provisions of
3 & 4 Vict.
c. 97.

[49.]

XVI. And whereas by the said act of the fourth year of the reign of her majesty entitled "An act for regulating railways," it is among other things enacted, that whenever, &c. [*It recites the 11th section *of 3 & 4 Vict. c. 97, which authorized the Board of Trade to enforce provisions of railway acts.*] And whereas it is expedient that more effectual provision should be made, not only for enforcing a compliance on the part of railway companies with the provisions of their acts, but also for restraining railway companies from performing acts unauthorized by such provisions ; be it enacted, that so much of the said act as is hereinbefore recited shall be repealed.

Proceedings for restraining Railway Companies from exceeding the Powers of their Acts of Incorporation.

If railway
companies
contravene
or exceed the
provisions of
their acts, or
of any general
act, the
Board of
Trade to
certify the
same to the
attorney-
general, &c.,
who shall
proceed a-
gainst him.

XVII. That whenever it shall appear to the lords of the said committee that any of the provisions of the several acts of parliament regulating any railway company or the provisions of this act or of any general act relating to railways, have not been complied with on the part of any railway company or any of its officers, or that any railway company has acted or is acting in a manner unauthorized by the provisions of the act or acts of parliament relating to such railway, or in excess of the powers given and objects defined by the said act or acts, and it shall also appear to the lords of the said committee that it would be for the public advantage that the company should be restrained from so acting, the lords of the said committee shall certify the same to her majesty's attorney-general for England or Ireland, or to the lord advocate for Scotland, as the case may require ; and thereupon

the said the said attorney-general or lord advocate shall, in case such default of the railway company shall consist of non-compliance with the provisions of the act or acts relating thereto or of this act, or of any general act relating to railways, proceed by information, or by action, bill, plaint, suit at law or in equity, or other legal proceeding as the case may require, to recover such penalties and forfeitures, or otherwise to enforce the due performance of the said provisions, by such means as any person aggrieved by such non-compliance, or otherwise authorized to sue for such penalties, might employ under the provisions of the said acts; and in case the default of the railway company shall consist in the commission of some act or acts unauthorized by law, then the said attorney-general or lord advocate, upon receiving such certificate as aforesaid, shall proceed by suit in equity, or such other *legal proceeding as the nature of the case may require, to obtain an injunction or order (which the judge in equity or other judge to whom the application is made shall be authorized and require to grant, if he shall be of opinion that the act or acts of the railway company complained of is or are not authorized by law), to restrain the company from acting in such illegal manner, or to give such other relief as the nature of the case may require.(d).

7 & 8 VICT.
c. 85.

[*50]

(d) Where a railway company was authorized to make a direct line of railway, with a branch railway, and were about to complete and open the direct line, but had abandoned the branch line, the Attorney-General has no right to file an information under this section, to restrain the opening of the direct line as a means of compelling the completion of the branch line, alleging that the abandonment of the branch line was an injury to the public. (*Att.-Gen. v. Birmingham and Oxford Railway Company*, 16 Jur. 113.)

XVII. Provided always, and be it enacted, that no such certificate as aforesaid shall be given by the lords of the said committee until twenty-one days after they shall have given notice to the company against or in relation to whom they shall intend to give such certificate of their intention to give such certificate; and that no legal proceedings shall be commenced under the authority of the lords of the said

Notice to be given to the company. Prosecutions to be under the sanction of the Board of Trade, and within

7 & 8 VICT.
c. 85.
one year after
the offence.

committee against any railway company for any offence against any of the several acts relating to railways or this act, of any general act relating to railways, except upon such certificate of the lords of the said committee as aforesaid, and within one year after such offence shall have been committed (e).

(e) The object of this and preceding section is to restrict railway companies from performing acts contrary to or unauthorized by their acts of incorporation, by vesting in the Board of Trade a discretionary power of proceeding in the event of a railway company acting in manner which, in the judgment of that Board, is not warranted by law. It is sufficiently obvious that it is important, where companies possessing such immense capital and extensive powers have been incorporated for certain specific purposes, that they should not be allowed to overstep the limits prescribed by their acts, and engage in transactions and undertakings not warranted by the provisions sanctioned by parliament. For instance, that railway companies should, without having applied to parliament for express powers and submitted the case to the scrutiny of a proper tribunal, purchase or lease canals, conclude purchases of land and enter into contracts for the construction of projected branch railways, become

[*51] *proprietors of coaches or steamboats, or engage in other transactions of a similar character, is obviously improper. See 5th Report on Railways, 24th May, 1844, No. 318, H. C., p. xviii.

Lord Campbell (H. L., 30th June, 1845,) asked whether according to existing law, the practice of one railway company buying up other projected railways could be prevented and if not whether it was the intention of government to introduce any measure to put a stop to that practice. Lord Dalhousie said, that no doubt could be entertained of the fact that projected lines of railway were bought up by existing companies. The advantages of amalgamation were sometimes very great, and sometimes the transaction was detrimental to the public interest. The legislature, how-

ever closely investigated all such transactions when the bills came before the houses of parliament: that by the existing law, the Board of Trade certainly had the power under the act of 7 & 8 Vict. c. 85, ss. 17, 18, to interfere in such transactions by sending a certificate of the fact of purchase to the law officers of the crown, whose opinion was that such purchases were not legal. Notices were accordingly given to the railway companies, who have to meet the case against them. He believed the law was sufficient to meet them, but if not, the government would make it a duty to put the law into such a state as to stop the abuses complained of.—H. L. 30th June, 1845; Hans. P. Deb. vol. 81. p. 1344.

7 & 8 VICT.
c. 85.

Provisions as to Loan Notes.

XIX. And whereas many railway companies have borrowed money in a manner unauthorized by their acts of incorporation or other acts of parliament relating to the said companies, upon the security of loan notes or other instruments purporting to give a security for the repayment of the principal sums borrowed at certain dates, and for the payment of interest thereon in the meantime (*f*): and whereas such loan notes or other securities issued otherwise than under the provision of some act or acts of parliament have no legal validity, and it is expedient that the issue of such illegal securities should be stopped; but such loan notes or other securities having been issued and received in good faith as between the borrower and lender, and for the most part for the lawful purposes of the undertaking, and in ignorance of their legal invalidity, it is expedient to confirm such as have been already issued; be it enacted, that from and after the passing of this act any railway company issuing any loan note or other negotiable or assignable instrument purporting to bind the company as a legal security for money advanced to the said railway company otherwise than *under the provisions of some act or acts of parliament authorizing the said railway company to raise such money and to issue such security, shall for every such offence forfeit to her majesty a sum equal to the sum for which such loan note or other instrument purports

Issue of loan notes and other illegal securities by railway companies prohibited.

[*52]

7 & 8 VICT.
c. 85.

Loan notes
already is-
sued may be
renewed.

to be such security : provided always, that any company may renew any such loan note or other instrument issued by them prior to the passing of this act for any period or periods not exceeding five years from the passing of this act.

(f) In a great many cases large sums of money had been borrowed by railway companies in the excess of the amount of one-third of their capital, which they were authorized to raise by way of loan or mortgage under their acts of incorporation. These sums have been generally raised upon the security of instruments known as loan notes, and sometimes in anticipation of calls upon shares, sometimes in excess of the total amount of capital authorized by parliament for the purposes of the undertaking. Such securities, and all transactions of a similar description, which involve the borrowing of any sum of money by a railway company in a way not authorized by act of parliament, were considered absolutely invalid, and that the lenders had no means whatever of enforcing the repayment of their money either against the company or against the directors or shareholders personally.—Fifth Report of Select Committee on Railways, 21st May, 1844 (115, 2), p. xvii. See *Campbell v. London and Brighton Railway Company and Crowley*, 4 Railw. C. 475.

Loan notes
already issued
to be paid
when due.

XX. That where any railway company, before the twelfth day of July one thousand eight hundred and forty-four, shall have issued or contracted to issue any such loan notes or other unauthorized instruments, the company may and shall pay off such loan notes or other instruments as the same may fall due, subject as hereinbefore provided ; and until the same shall be so paid off the said loan notes or other instruments shall entitle the holders thereof to the payment by the company of the principal sum and interest thereby agreed to be paid.

Register of
loan notes.

XXI. That a register of all such loan notes or other instruments shall be kept by the secretary ; and such register shall be open, without fee or reward, at all reasonable times, to the inspection of any shareholder or auditor of the undertaking, and of every person interested in any such loan note or other instrument, desirous of inspecting the same.

**Recovery of Tithe Commutation Rent-Charge.*7 & 8 VICT.
c 85.[53*]
Remedy for
recovery of
tithe rent
charged on
railway land.

XXII. And whereas the remedies now in force for the recovery of tithe commutation rent-charges are in many instances ineffectual for such parts thereof as are charged upon lands taken for the purposes of a railway, and it is therefore expedient to extend the said remedies when the said rent-charges may have been duly apportioned; be it enacted, that in all cases in which any such rent-charge, or part of any rent-charge, has been or hereafter shall be duly apportioned under the provisions of the acts for the commutation of tithes in England and Wales (*g*), upon lands taken or purchased by any railway company for the purposes of such company, or upon any part of such lands, it shall be lawful for every person entitled to the said rent-charge or parts of said rent-charge in case the same has been or shall be in arrear and unpaid for the space of twenty-one days next after any half-yearly day fixed for the payment thereof, to distrain for all arrears of the said rent-charge, upon the goods, chattels and effects of the said company, whether on the land charged therewith, or any other lands, premises or hereditaments of such company, whether situated in the same parish or elsewhere, and to dispose of the distress when taken, and otherwise to demean himself in relation thereto, as any landlord may for arrears of rent reserved on a lease for years: provided always, that nothing herein contained shall give or be construed to give a legal right to such rent-charge, when but for this act such rent-charge was not or could not be duly apportioned (*h*).

(*g*) Some of the railroads, and the Great Western in particular, refused to pay the rent-charges apportioned on the land over which they passed; Report of Tithe Commissioners, 2d April, 1844. That company contended, that whenever the commutation of tithe had taken place since the railway was made, that the railway company was not liable to have any apportionment put upon it. See 5th Rep. on Railways, Sess. 1844, No. 318, p. 310, 448—450. It may be noticed, that under a clause in a local navigation act, giving compensation for the value of lands, tenements and hereditaments to be taken, or for damage done thereto, the tithe

7 & 8 VICT.
c. 85.

owner is not entitled to compensation for the injury done to him by the conversion of tithable land, taken for the purpose of the navigation, and covered with water. (*Rex v. Nene Outfall Commissioners*, 4 Man. & R. 647 ; 9 B. & C. 875.)

[*54]

The clergy of the city of London were, by a decree made *under the authority of an act of parliament, 37 Hen. 8, c. 12, declared entitled to 2s. 9d. in the pound of the rent by the year of all houses, shops, &c., as and for tithe. The Blackwall Railway Company's Act empowered that company to remove certain houses, and it declared, that for indemnifying the rectors, &c., against such loss as might accrue to them from the railway taking down houses, &c., and until new houses should be erected on the ground which should be cleared, of such an annual rent or value that the tithes actually payable therefor should be fully equal to the tithes or yearly sums of money payable for the houses quitted by the occupiers, the company should pay tithes for the houses quitted by the occupiers "according to the last assessment thereof to the 25th March last," and such sum or sums should diminish in proportion to the tithes actually payable for new houses erected and occupied on ground which should be so cleared. In respect of all the houses taken by the company with the exception or two, annual payments had been taken in lieu of tithes, at a rate, in each instance, below 2s. 9d. in the pound on the annual value agreed between the rector and the occupiers. The rector claimed to be paid 2s. 9d. in the pound upon the annual value of all the premises taken by the company :—It was held, reversing the decision of Wigram, V. C., that where there had been an agreed rent, but the rector had received less than 2s. 9d. in the pound, he was not now entitled to receive 2s. 9d. in the pound ; that the object of the act was only to give indemnity to the rector ; and that the term "assessment" had reference to the arrangements throughout the parish, whereby the amount of tithes to be paid to the 25th March, 1839, had been understood, agreed and settled. It was also held, reversing the decision of Wigram, V. C., that the amount of

tithe payable by the company was to be credited with the tithes actually payable to the rector in respect of new houses, and not merely with the sums actually received by the rector in respect of such new houses. (*London and Blackwall Railway Company v. Letts*, 15 Jur. 995 ; 3 H. L. Ca. 470.)

And it was held, affirming *Wigram, V. C.*, that the word "assessment" did not mean the assessment to the poor-rate. (*Ib.* See 5 Hare, 685 ; Railw. C. 530 ; 6 *Ib.* 687.)

(*h*) As to the recovery of tithe commutation rent-charges, see 6 & 7 Will. 4, c. 71, ss. 81, 82, 83, 84, ; 5 & 6 Vict. c. 54, s. 17 ; Shelford on Tithes, 3d ed., p. 298—303, 388, and suppl. p. 46.

Service of Notices to and from Board of Trade.

XXIII. That all notices, requisitions, orders, regulations, appointments, certificates, certified copies and other documents in writing, signed by some officer appointed for the purpose by the lords of the said committee, shall for the purposes of this act be deemed *to have been made by the lords of the said committee : and all certificates of any thing done by the lords of the said committee in relation to this act, and certified copies of the minutes of proceedings or correspondence of the lords of the said committee in relation thereto, signed by such officer, shall be deemed sufficient evidence thereof, and that in the absence of evidence to the contrary, without proof of the authority of the person signing the same or of the signature thereto, and service of the same at one of the principal offices of any railway company on the secretary or clerk of the said company, or by sending the same by post, addressed to him at such office, shall be deemed good service upon the said company ; and all notices, returns and other documents required by this act to be given to or laid before the lords of the said committee, shall be delivered at or sent by post addressed to the office of the lords of the said committee (*i*).

Communications to and from Board of Trade, service of notices, &c.

[*55]

(*i*) See similar clauses, 3 & 4 Vict. c. 97, s. 20, p. 21 ; 5 & 6 Vict. c. 55, s. 19, p. 34 ; 14 & 15 Vict. c. 64, s. 3 *post*, p. 62. Penalties.

XXIV. That all penalties under this act for the applica-

7 & 8 VICT.
c. 85.

tion of which no special provision is made shall be recovered in the name and for the use of her majesty, and may be recovered in any of her majesty's courts of record, or in the court of session or in any of the sheriff courts in Scotland.

Interpreta-
tion of act.

XXV. That where the word "railway" is used in this act it shall be construed to extend to railways constructed under the powers of any act of parliament; and when the words "passenger railway" are used in this act, they shall be construed to extend to railways constructed under the powers of any act of parliament upon which one third or more of the gross annual revenue is derived from the conveyance of passengers by steam or other mechanical power; and whenever the word "company" is used in this act it shall be construed to extend to include the proprietors for the time being of any such railway; and that where a different sense is not expressly declared, or does not appear by the context, every word importing the singular number or the masculine gender shall be taken to include females as well as males, and several persons and things as well as one person or thing.

*GAUGE OF RAILWAYS.

[*56]

9 & 10 VICTORIA, c. 57.

*An Act for regulating the Gauge of Railways.*9 & 10 VICT.
c. 57.

[18th August, 1846.]

WHEREAS it is expedient to define the gauge on which railways shall be constructed; be it enacted, that after the passing of this act it shall not be lawful (except as hereinafter excepted) to construct any railway for the conveyance of passengers on any gauge other than four feet eight inches and half an inch in Great Britain, and five feet three inches in Ireland; provided always, that nothing hereinbefore contained shall be deemed to forbid the maintenance and repair of any railway constructed before the passing of this act on any gauge other than those hereinbefore specified, or to forbid the laying of new rails on the same gauge on which such railway is constructed within the limits of deviation authorized by the several acts under the authority of which such railways are severally constructed (a).

On what
gauge rail-
ways shall
be made.

(a) A railway act enacted that the railway should be constructed, in all respects, to the satisfaction of the engineer of the Great Western (a broad gauge railway,) and that it should be formed of such gauge, and according to such mode of construction, as to admit of its being worked continuously with the Great Western. The court was of opinion that the railway might be constructed on the narrow gauge as well as the broad. *Beman v. Rufford*, 1 Sim. N. S. 550.

II. That nothing hereinbefore contained shall apply to any railway constructed under the provisions of any present or future act containing any special enactment defining the gauge or gauges of such railway, or any part thereof, or to any railway which is in its whole length southward of the Great Western Railway, or to any railway in any of the coun- Exception of
certain rail-
ways.

- 9 & 10 Vict. ties of Cornwall, Devon, Dorset, or Somerset, for which any
c. 57. act has been or shall be passed in this session of parliament,
[*57] or to any railway in any of the last-mentioned counties now
in course of construction, *or to the two railways severally to
be constructed under the authority of two acts passed in this
9 & 10 Vict. session of parliament, severally entitled "An Act for making
c. clxvi. a Railway from the Great Western Railway at West Dray-
9 & 10 Vict. ton to Uxbridge in Middlesex," and "An Act for making a
c. ccxxxvi. Railway from the Great Western Railway at Maidenhead in
Berkshire to the Town of High Wycombe in the County of
Buckingham;" or to so much of an act passed in this session,
9 & 10 Vict. entitled "An Act to authorize certain Extensions of the line
c. cclxxviii. of the Oxford, Worcester and Wolverhampton Railway, and
to amend the Act relating thereto, as authorizes the Con-
struction of a Branch Railway from the Oxford, Worcester
and Wolverhampton Railway to the Town of Witney in the
County of Oxford;" or to an act passed or which may be pas-
sed in this session of parliament, to authorize the Construc-
tion of a Railway from Melin-y-Manach to Rhydydefydd in
the County of Glamorgan."

- Certain Rail- III. That the several railways authorized to be construc-
ways to be ted by an act passed in the last session of parliament, enti-
on the broad tled "An Act for making a Railway, to be "called 'The
gauge. South Wales Railway,'" and by an act also passed in the ses-
8 & 9 Vict. sion of parliament, entitled "An Act for making a Railway
c. cxc. from Monmouth to Hereford, with Branches therefrom to
8 & 9 Vict. Westbury and to join the Forest of Dean Railway," and by
c. cxci. two acts passed in this session of parliament, severally enti-
9 & 10 Vict. tled "An Act for completing the Line of the South Wales
Railway, and to authorize the Construction of an Extension
and certain Alterations of the said Railway, and certain
9 & 10 Vict. Branch Railways in connection therewith," and "An Act for
making a Railway Communication between the City of Bris-
tol and the proposed South Wales Railway in the County of
Monmouth, with a Branch Railway "therefrom," shall be
constructed on the gauge of seven feet.
- Gauge not to IV. That it shall not be lawful after the passing of this
be altered. act to alter the gauge of any railway used for the convey-
ance of passengers.

- Provision as V. That nothing hereinbefore contained shall be deemed to
to the Ox- affect the provisions of two acts passed in the last session of

parliament, respectively entitled "An Act for making a Railway from the City of Oxford to the Town of Rugby," and "an Act for making a Railway from Oxford to Worcester and * "Wolverhampton," with respect to the gauge on which they are to be formed, or the additional rails which according to the several provisions of the last two recited acts are to be or may be laid down and maintained on the railways thereby authorized, or with respect to the powers thereby conferred on the commissioners of her majesty's privy council for trade and foreign plantations concerning the construction and use of the railways thereby authorized.

9 & 10 Vict.
c. 57.
ford and
Rugby, and
and Oxford
Worcester
and Wolver-
hampton
railways.
8 & 9 Vict.
c. clxxxviii.
8 & 9 Vict.
c. clxxiv.
[*58]

VI. That if any railway used for the conveyance of passengers shall be constructed or altered contrary to the provisions of this act, the company authorized to construct the railway, or, in the case of any demise or lease of such railway, the company for the time being having the control of the works of such railway, shall forfeit ten pounds for every mile of such railway which shall be so unlawfully constructed or altered, during every day that the same shall continue so unlawfully constructed or altered; and in estimating the amount of any such penalty any distance less than one mile shall be estimated as a mile.

Penalty on
company for
constructing
railways
contrary to
this act.

VII. That, over and above the penalty hereinbefore provided, if any railway used for the conveyance of passengers shall be constructed or altered contrary to the provisions of this act, it shall be lawful for the commissioners of her majesty's woods, forests, land revenues, works and building, or for the lords of the committee of her majesty's privy council for trade and foreign plantations, to abate and remove the same or any part thereof so constructed or altered contrary to the provisions of this act, and to restore the site thereof to its former condition.

Railways
constructed
contrary to
this act may
be abated.

VIII. That all penalties under this act may be recovered from the company liable to pay and make good the same, as, under the provisions of an act passed in the last session of parliament, entitled "An Act for consolidating in One Act certain Provisions usually inserted in Acts authorizing the making of Railways," a penalty for any infringement of the last-recited act is recoverable against a company authorized to construct a railway (b.)

Recovery of
penalties.
8 & 9 Vict.
c. 20.

(b) See 8 & 9 Vict. c. 20, ss. 145—152.

[*59]

•PREVENTION OF OFFENCES AGAINST
RAILWAYS.

14 & 15 VICT.
c. 19.

14 & 15 VICTORIA, c. 19.

An act for the better Prevention of Offences.

[3d July, 1851.]

Persons wil-
fully placing
wood, &c.
on railways,
taking up
railways
&c., turning
machinery
or showing
signals &c.
with intent
to commit
injuries to
railway or
endanger the
safety of
persons,
guilty of
felony.

It is enacted (amongst other things) as follows :—

VI. If any person shall wilfully and maliciously put, place, cast or throw upon or across any railway any wood, stone or other matter or thing, or shall wilfully and maliciously take up, remove or displace any rail, sleeper or other matter or thing belonging to any railway, or shall wilfully and maliciously turn, move or divert any points or other machinery belonging to any railway, or shall wilfully and maliciously make or show, hide or remove any signal or light upon or near to any railway, or shall wilfully and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to obstruct, upset, overthrow, injure or destroy any engine, tender, carriage or truck using such railway, or to endanger the safety of any person traveling or being upon such railway, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his natural life or for any term not less than seven years, or to be imprisoned with or without hard labor, for any term not exceeding three years.

If any per-
son shall
cast any
wood, &c.
upon any
railway car-
riage with
intent to
endanger the
safety of any
person there-

VII. If any person shall wilfully and maliciously cast, throw or cause to fall or strike against, into or upon any engine, tender, carriage or truck used upon any railway any wood, stone or other matter or thing with intent to endanger the safety of any person being in or upon such engine, tender, carriage or truck, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the

term of his natural life or for any term not less than *seven years, or to be imprisoned, with or without hard labor, for any term not exceeding three years. 14 & 15 VICT.
c. 19.

VIII. If any person shall wilfully and maliciously set fire to any station, engine house, warehouse or other building belonging or appertaining to any railway, dock, canal or other navigation, every such person shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his natural life, or for any term not less than seven years, or to be imprisoned, with or without hard labor, for any term not exceeding three years; and if any person shall wilfully and maliciously set fire to any goods or chattels being in any building, the setting fire to which is made felony by this or any other act of parliament, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding ten years nor less than seven years, or to be imprisoned, with or without hard labor, for any term not exceeding three years (a). in, such person to be guilty of felony, &c. [*60]
Any person wilfully setting fire to any railway station, &c. guilty of felony.

(a) See *ante*, pp. 18, 19.

X. It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any offence against the provisions of this act, and to convey him or deliver him to some constable or other peace officer, in order to his being conveyed, as soon as conveniently may be, before a justice of the peace, to be dealt with according to law. Any person may apprehend persons committing offences against this act, and convey them before a justice.

[*61] •TRANSFER OF POWERS FROM COMMISSIONERS
OF RAILWAYS TO BOARD OF TRADE.

14 & 15 VICT.
c. 64.

14 & 15 VICTORIA, c. 64.

*An act to repeal the Act for constituting Commissioners of
Railways.*

[7th August, 1851.]

9 & 10 Vict.
c. 105.

Whereas an act was passed in the session holden in the ninth and tenth years of her majesty (chapter one hundred and five), for constituting commissioners of railways : and whereas it is expedient that the said act should be repealed, and provisions be made for the exercise and performance of the powers and duties which since the passing of the said act have been vested in or imposed on the said commissioners : be it enacted as follows :

Recited act repealed, and powers, &c. of commissioners of railways under subsequent acts transferred to board of trade.

I. From and after the tenth of October, one thousand eight hundred and fifty-one, the said act shall be repealed, and all powers, rights, authorities and duties vested in or exercised or performed by the commissioners of railways under any act passed since the passing of the said recited act, or which may be passed during the present session of parliament, shall be transferred to and vested in and performed by the lords of the committee of her majesty's privy council for trade and foreign plantations as if they had been named in such acts instead of the said commissioners ; and all proceedings pending before the said commissioners on the said tenth of October, or carried on under their authority, shall be continued and carried on by and before the lords of the said committee, who shall have, exercise, and perform the same powers, rights, authorities and duties in respect of all such proceedings as might have been exercised or performed by such commissioners in case this act had not been passed.

Powers to continue officers appointed by

II. It shall be lawful for the lords of the said committee, with the approval of the commissioners of her majesty's treasury, to continue, for the transaction of *the business transferred to the lords of the said committee under this act, all or

[*62]

any of the officers and servants appointed by the said commissioners of railways, and from time to time, with such approval, to remove such officers and servants or any of them.

14 & 15 VICT.
c. 64.
commission-
ers of rail-
ways.

III. Where by any act relating to railways or to any railway the commissioners of railways of the lords of the said committee are empowered or required to make or issue any appointment, authority, determination, order, requisition, certificate or notice, or to do any other act, the lords of the said committee may, after the said tenth of October, signify such appointment, authority, determination, order, requisition, regulation, certificate, notice or other act by a written or printed document, signed by one of the joint secretaries of the lords of the said committee, or by some assistant secretary, or other officer appointed by them to sign documents relating to railways; and every appointment, authority, determination, order, requisition, regulation, certificate, notice or other act signified by a written or printed document purporting to be so signed as aforesaid, shall be deemed to have been duly made, issued or done by the lords of the said committee; and every such document shall be received in evidence in courts and before all justices and others, without proof of the authority or signature of such secretary or other officer, or other proof whatsoever, until it be shown that such document was not signed by the authority of the lords of the said committee (a).

Appoint-
ments, or-
ders, &c., of
the board of
the trade
how to be
signified.

[*62]

(a) 7 & 8 Vict. c. 85., s. 23, *ante*, p. 54.

[*63]

*COMPANIES CLAUSES CONSOLIDATION
ACT, 1845.

8 & 9 VICT.
c. 16

8 & 9 VICTORIA, c. 16.

An Act for consolidating in One Act certain Provisions usually inserted in Acts with respect to the Constitution of Companies incorporated for carrying on Undertakings of a Public Nature.

[8th May, 1845.]

Application of Act to future Incorporated Companies.

Act to apply
to all com-
panies incor-
porated by
acts hereafter
to be passed.

WHEREAS it is expedient to comprise in one general act sundry provisions relating to the constitution and management of joint stock companies, usually introduced into acts of parliament authorizing the execution of undertakings of a public nature by such companies, and that as well for the purpose of avoiding the necessity of repeating such provisions in each of the several acts relating to such undertakings as for insuring greater uniformity in the provisions themselves (a); may it therefore be enacted, that this act shall apply to every joint stock company which shall by any act which shall hereafter be passed be incorporated for the purpose of carrying on any undertaking, and this act shall be incorporated with such act; and all the clauses and provisions of this act, save so far as they shall be expressly varied or or excepted by any such act, shall apply to the company which shall be incorporated by such act, and to the undertaking for carrying on which such company shall be incorporated, so far as the same shall be applicable thereto respectively; and such clauses and provisions, as well as the clauses and provisions of every other act which shall be incorporated with such act, shall, save as aforesaid, form part of such act, and be construed together therewith as forming one act.

Object of con-

(a) The three consolidation acts embody in a collected

form the various clauses usually inserted in acts of parliament for incorporating companies. The object of each of these three acts, as expressed in the preamble, is as well for the purpose of avoiding the necessity of repeating such provisions in each of the several acts relating to such undertakings *as for ensuring greater uniformity in the provisions themselves. (8 & 9 Vict. c. 18, s. 1; 8 & 9 Vict. c. 20, s. 1.) Hitherto in every private act for the incorporation of any company the parties were obliged to insert clauses which were as applicable to any other act as their own, so that private acts were rendered extremely voluminous, great trouble was given to the committees in parliament, and great expenses incurred by the parties; these clauses were now consolidated by the three acts, and will be equally applicable for all companies needing them. The measure is divided into three sets of clauses: 1. The Companies Clauses Consolidation Act, 1845, relating to the constitution and management of joint stock companies; 2. The Lands Clauses Consolidation Act, 1845, relating to the question of lands required for undertakings of works of a public nature, and the compensation to be made for the same; 3. The Railways Clauses Consolidation Act, 1845, comprising sundry provisions usually introduced into acts of parliament authorizing the construction of railways. It is conceived that this measure will afford a great relief to the persons interested, because heretofore without the exercise of great vigilance they were not secure against the introduction of some particular clause injurious to their interests, whereas in future the committee on bills will only have to examine the bill and see whether the particular clauses are departed from, and whether any different clauses of an objectionable nature have been introduced.

Acts of parliament authorizing the construction of railways or similar undertakings are regarded in the light of contracts made by the legislature on behalf of every person interested in any thing to be done under them. Lord Eldon, C. said that he had no hesitation in asserting that, unless that prin-

8 & 9 Vict.
c. 16.
consolidation
acts.

[*64]

Sect. 1.

General principles applicable to construction of acts of parliament authorizing public works.

8 & 9 VICT.
c. 16.
Sec 1.

ciple is applied in constructing statutes of this description, they become instruments of greater oppression than any thing in the whole system of administration under our constitution. Such acts have now become extremely numerous, and from their number and operation they so much effect individuals, that his lordship apprehended those who came for them to parliament do in effect undertake that they shall do and submit to whatever the legislature empowers and compels them to do, and that they shall do nothing else; that they shall do and forbear all that they are thereby required to do and to forbear, as well with reference to the interests of the public as with reference to the interests of individuals. It is upon this ground that applications are frequently made to stay operations where a canal is in the progress of formation; in such a case it may be of very little consequence to A. B. whether the canal is brought to his lands through the lands of C. D. or through those of E. F.; nevertheless, if the legislature has said the canal shall be brought to the lands of A. B. from the lands of E. F. and not of C. D. the Court of Chancery would never permit the parties to bring the canal to the lands of A. B. from the lands of C. D.; the parties are obliged to submit to the contract which the legislature has made for them. The result is, that the contract [*65] *shall be carried into execution; and the king's subjects are compelled to submit to it, upon the notion that it will be for the public good; but they are not compelled to submit to any thing except what the legislature has said shall be done. (*Blakemore v. Glamorganshire Canal Navigation*, 1 My. & K. 162, 163. See *Rex v. Cumberworth*, 3 B. & Ad. 108; 1 Nev. & P. 197; *Rex v. Greenwich Railw. Co.*, 4 Nev. & M. 458; *Lee v. Milner*, 2 Mees. & W. 839; *Shand v. Henderson*, 2 Dow P. C. 521.) In *Lee v. Milner*, 4 Y. & Coll. 618, Alderson, B. said, these acts of parliament have been called parliamentary bargains made with each of the landowners; perhaps more correctly they ought to be treated as "conditional powers given by parliament to take the land of the different proprietors through whose estate the works

are to proceed." Each landholder, therefore, has a right to have the powers strictly and literally carried into effect as regards his own land, and has a right also to require that no variation shall be made to his prejudice in the carrying into effect the bargain between the undertakers and any one else ; That he conceived to be the real view taken of the law by Lord Eldon in the case of *Blakemore v. Glamorgan-shire Canal Co.*, *supra*. But he said he could not accede to the proposition that where the contract, as far as regards the land of the complaining landowner, has been exactly performed, any variation made at a distant point and with the consent of the landowner there, and producing no real injury to the complaining landowner, ought to be the ground for an injunction in a court of equity, to be granted at his application. Tindal, C. J. observed, that the language of these acts of parliament is to be treated as the language of the promoters of them ; they ask the legislature to confer great privileges upon them, and profess to give the public certain advantages in return : acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favor of the public. (*Parker v. Great Western Railw. Co.*, 7 Scott, N. R. 870.)

8 & 9 VICT.
c. 16.
Sect. 1.

[65]

When large powers are entrusted to a company to carry their works into execution without the consent of the owners and occupiers of the land, it is reasonable and just that any injury to property, which can be shown to arise from the prosecution of such works, should be fairly compensated for to the party sustaining such injury ; and where the intention to give compensation in such a case has been clearly expressed, every fair intendment ought to be given to effectuate that intention. (*Reg. v. Eastern Counties Railw. Co.*, 2 Railw. C. 736 ; see pp. 752, 754.) Lord Cottenham, C. observed, "It is extremely important to watch over the interests of those whose property is affected by these companies, to take care that the company shall not in any misrepresentation they may make, if they have made any, be per-

8 & 9 Vict.
c. 16.
Sect. 1.

[*66]

mitted to exercise powers beyond those which the act of parliament gives them, and to keep them most strictly within the powers of the act of parliament. The powers are so large and so injurious to the interests of individuals, that I think it is the duty of every court to keep them most strictly within those powers; and if there be any reasonable doubt as to the extent of their powers, they must go elsewhere and get enlarged *powers; but they will get none from me by way of construction of their act of parliament.” (*Webb v. Manchester and Leeds Railw. Co.*, 4 My. & Cr. 120; 1 Railw. C. 599; see *Scales v. Pickering*, 1 M. & P. 195; 4 Bing. 448.) These companies procure ample powers to be bestowed upon them; but it not unfrequently happens that in the course of their works they find that they have not powers sufficient for perfecting all they contemplate; when that is the case, they must either make what bargain they can with the persons whose rights are adverse to them, or they must again apply to parliament to have their powers enlarged. The Court of Chancery does not sit to enlarge such powers, but to keep both parties within the limits which the legislature has prescribed. (*Kemp v. London and Brighton Railw. Co.*, 1 Railw. C. 508. See 8 & 9 Vict. c. 18, s. 16, n., *post.*)

General
Rules.

Many rules for constructing acts of parliament are laid down in books of authority (see Bac. Abr. tit. Statutes; Dwarrris on Statutes, 688—779,) which are so extremely technical, that the application of some of such rules to modern statutes may be doubted. Indeed the ancient and modern statutes scarcely admit of being construed according to the same rules. The former often contain little more than the enunciation of a general principle of law, leaving the courts to work out and establish the provisions necessary for carrying the law into effect, whilst in modern statutes the opposite extreme is followed, and the enactments, with a few exceptions, are expressed with much useless circumlocution, and are overloaded with minute provisions, details and repetitions. Provisions in acts of parliaments are to be con-

strued according to the ordinary sense of the words, unless such construction would lead to some unreasonable result, or be inconsistent with or contrary to the declared or implied intention of the framers of the law, in which case the grammatical sense of the words may be extended or modified. (Per Parke, J., *Rex v. Pease*, 1 Nev. & M. 594; *Bennett v. Daniel*, 10 B. & C. 506; *Eyston v. Studd*, Plowd. 463; Bac. Abr. Statute (I.), 6.) By an act reciting that a railway between certain points would be of great public utility, and would materially assist the agricultural interest and the general traffic of the country, power was given to a company to make such railway, according to a plan deposited with the clerk of the peace, from which they were not to deviate more than 100 yards. By a subsequent act the company, or persons authorized by them, were empowered to use locomotive engines upon the railway. The railway was made parallel and adjacent to an ancient highway, and in some places came within five yards of it. It did not appear whether or not the line could have been made in those instances to pass at a greater distance. The locomotive engines on the railway frightened the horses of persons using the highway as a carriage road. On an indictment against the company for a nuisance, it was held, that this interference with the rights of the public must be taken to have been *contemplated and sanctioned by the legislature, since the words of the statute authorizing the use of the engines were unqualified; and the public benefit derived from the railway (whether it would have excused the alleged nuisance at common law or not) showed at least that there was nothing unreasonable in a clause of an act of parliament giving such unqualified authority. (*Rex v. Pease*, 4 B. & Ad. 30; 1 Nev. & M. 690.) For the legislature must be presumed to have known that the railroad would be adjacent for a mile to the public highway, and, consequently, that travelers upon the highway would be in all probability incommoded by the passage of locomotive engines along the railroad.

8 & 9 VICT.
c. 16
Sect. 1.

(*67)

8 & 9 VICT. That being presumed, there was nothing unreasonable or inconsistent in supposing that the legislature intended that the part of the public who might use the highway should sustain some inconvenience for the sake of the greater good to be obtained by other parts of the public, in the more speedy traveling and conveyance of merchandize along the new railroad. And no one could say that the public interests are unjustly dealt with, when the injury to one line of communication is compensated by the increased benefit of another (*Rex v. Pease*, 4 B. & Ad. 30 ; 1 Nev. & M. 695 ; see *Rex v. Russell*, 9 Dowl. & R. 566 ; 6 B. & C. 560.) Where a nuisance was held, with the dissent of Lord *Tenterden*, C. J., excusable on that principle at common law, see *Rex v. Morris*, 1 B. & Ad. 447.

The rule by which the courts are to be guided in construing acts of parliament is to look at the precise words, and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice ; and if it should, so to vary and modify them as to avoid that which it certainly could not be the intention of the legislature should be done. (Per *Parke, J.*, *Perry v. Skinner*, 2 Mees. & W. 476.)

Where the consequences from a particular construction of a statute are absurd, the court will seek out another, and will be governed by the intention, and not by the words, of the legislature. (Co. Litt. 360 a, 381 b ; Plowd. 13, 88 a, 109 a, 204, 205 a ; *Herbert's case*, 3 Rep. 13 b ; Dyer, 245 a ; 2 Inst. 112, 292.) In some cases, so great a difference exists between the obvious import of the text of a statute, and its practical operation as varied by judicial decision, as to render the mere perusal of it in many instances of little use to the inquirer, and it may not unfrequently mislead him. This has arisen in a great degree from the imperfection of the principles adopted in framing acts of parliament, and from the neglect of the legislature, especially in early times, in not interfering in cases where the law was manifestly obscure or imperfect, and adapting their written laws to the changes of manners and wants of the times. Courts of justice have thus

been induced to resort, under different circumstances, to various pretexts in order to give effect to what they conceived was the object of a law, or by the aid of judicial construction to remedy what they considered were the errors or omissions of the legislature. Lord *Hobart* asserted that the judges have the liberty and authority over *laws, especially over statute laws, to mould them to the truest and best use, according to reason and convenience. (*Sheffield v. Rutcliffe*, Hob. Rep. 346.) It is improbable that any court of law or equity at the present day would admit so great a latitude of construction, in respect of any new statute, as was formerly allowed; but there are many instances in which the courts would pronounce that the question of construction was no longer *res integra*, and that on the ground of mere precedent and usage, a construction would be allowed to prevail inconsistent with that which must have prevailed had the matter been *res integra*.

8 & 9 VICT.
c 16.
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The rule of law upon the construction of all statutes is, whether they be penal or remedial, to construe them according to the plain, literal and grammatical meaning of the words in which they are expressed, unless the construction leads to a plain and clear contradiction of the apparent purpose of the act, or to some palpable and evident absurdity. (*Attorney-General v. Lockwood*, Mees. & W. 398.)

In remedial cases, the construction of statutes is extended to other cases within the reason or rule of them. But where it is a hard positive law, and the reason is not very plainly to be seen, it ought not to be extended by construction. (*Atcheson v. Everett*, Cowp. 391.) Much difficulty has been often experienced in arriving at the meaning which courts of justice may attribute to statutes, in consequence of the adoption of opposite principles in the construction of remedial and penal laws; this difficulty is increased where the statute is partly remedial and partly penal, and is necessarily subject to still greater doubts where the very question, whether the statute more properly belongs to the one or the other class, is also in controversy. (See *Attorney-General v. Jeffreys*, 13 Price, 545.)

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Penal statutes must be constructed strictly. (Bac. Abr. Statute (I.,) 9; 1 Bl. Comm. 88.) An act so penal as the Stock Jobbing Act, 7 Geo. 2, c. 8, is not to be enlarged beyond the strict subject matter to which it relates. (*Wells v. Porter*, 2 Bing. N. C. 722; 5 Scott, N. R. 141.)

The true rule of distinction appears to be, that where the offence intended to be guarded against by a statute was punishable before the making of such statute prescribing a particular method of punishing it, there such particular remedy is *cumulative*, and does not take away the former remedy. But where the statute only enacts that the doing any thing not punishable before, shall for the future be punishable in such and such a particular manner, there it is necessary that such particular method, by such act prescribed, must be specifically framed, and not the common law method of indictment. (*Rex v. Robinson*, 2 Burr 805; *Rex v. Kopall*, 832; Cowp. 524, 650; *Beckford v. Hood*, 7 T. R. 620; *Rex v. Pice* 6 East, 327; *Rex v. Buck*, 1 Stir. 679; 1 Saund. 250 e, n. 3; 135 b, n. (g,) 6th ed.) It is a clear and established principle that, when a new offence is created by an act of parliament, and a penalty is annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty, but he may proceed *on the prior clause, on the ground of its being a misdemeanor. (*Rex v. Harris*, 4 T. R. 205 per *Ashhurst*.) An act of parliament giving a summary remedy to persons against defaulters, though in terms prescribing such remedy, is cumulative, and does not take away the previous right to sue by action at law. (*Sharp v. Warren*, 6 Price, 131.)

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Subsequent statutes in the affirmative, giving new penalties, do not repeal former methods of proceeding ordained by previous acts without negative words. (*Middleton v. Crofts*, 2 Atk. 295.)

Where an act of parliament gives a new right, and a particular remedy for the enforcement of it, the party must pursue that remedy, and no other can be resorted to. (Per Lord *Abinger*, *Hinchliffe v. Armistead*, 9 Mees. & W. 160; 11

Rep. 59; Hob. 298.) Although an old jurisdiction is not ^{8 & 9 VICT.} taken away by a new remedy being given, yet if a new right ^{c. 16.} be given, and a special remedy provided for enforcing it, ^{Sect. 1.} such remedy must be pursued. (Per Lord *Cottenham*, C., *Adams v. London and Blackwall Railw., Co.*, 6 Railw. C. 286, 287; 2 Mac. & G. 131. See *Underhill v. Ellicombe*, 1 M'Clel. & Y. 450.) An act of parliament prescribing a particular remedy for an offence, does not necessarily take away the party's remedy by action. (*Ward v. Bird*, 2 Chitt. 582.) Where a statute confers a right and annexes certain penalties for its infringement, an action for damages will not lie against a party infringing the right by the party aggrieved. *Stevens v. Jeacocke*, Law J; 1848; Q. B. 163; 11 Q. B. 731, 781.)

Another sound and recognized principle of construction is, that statutes shall not be presumed to alter the common law further or otherwise than the enactments have expressly declared. (*Arthur x. Bokenham*, 11 Mod. 148.)

Acts of parliament varying or taking away the rights of parties ought to be construed strictly. (*Buckeridge v. Flight*, 6 B. & C. 55.) Words in a statute, the meaning of which is well understood at common law, shall be understood in the sense given to them by the common law (*Smith v. Harman*, 6 Mod. 164); unless, as is frequently the case in modern statutes, a different sense is given to such words. See Index, *Interpretation Clauses—Words*.

When the language of a statute is not clear, a construction destructive of right ought not to be adopted; on the contrary, where the question for consideration is, whether existing right and property are to be taken away, and extinguished by a new statute of dubious import, it ought to be strictly construed, and a plain provision shown to that effect. The courts are not to assume an intention in the legislature to an unexpressed purpose, and thereupon interpret doubtful language and novel phrases, to carry that assumed intention into effect, in order to extinguish property and right. (*Perrin*, J., in *Farran v. Otitwell*. 2 Jebb. & Symes, 109.)

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It is laid down by several authorities (*Rex v. Williams*, 1 W. Bl. 95; *Wills v. Wilkins*, 6 Mod. 62; Barrington on Statutes, 337), that the title of an act is no part of it: but on some occasions the courts have adverted to the title of an *act in support of a particular construction of some enactment.

[*70] The construction of acts of parliament is sometimes affected by the punctuations and by divisions into sections; but these helps to construction are not deemed part of an act, and have occasionally been shown to be erroneous. (*Rex v. Newark* 3 B & C. 71.)

Preamble of
statutes.

The general rule is, that the preamble cannot control the enacting part of a statute, which is expressed in clear and unambiguous terms. (*Lees v. Summersgill*, 17 Ves. 508.) But if any doubt arise on the words of the enacting part, resort may be had to the preamble to explain it, by comparing it with the rest of the act, in order to collect the intention of the legislature. (*Crespigny v. Wittenoom*, 4 T. R. 993; *Walker v. Richardson*, 2 Mees. & W. 889; *Mason v. Armitage*, 13 Ves. 36.) Sir E. Coke observes, "the rehearsal or preamble of the statute is a good mean to find out the meaning of the statute, and, as it were, a key to open the understanding thereof." Instead of saying *generally* that the preamble should control the *enacting* clauses, or of limiting precisely how far it shall have that effect, which would have been attempting to make a line where one cannot be drawn, he cautiously says, that it is a good mean to find out the intention. (Co. Lit. 79 a, and note 42, by Harg. See 2 Inst. 308; 3 Sim. 41, n. (d).)

It was only where the preamble is used to restrain, control, or contradict the natural sense of the enacting part, that it can be consistently brought forward as independent of it. (Per Lord Denman in *Fellowes v. Clay*, 4 Q. B. R. 347; 7 Jur. 343. See *Salkeld v. Johnson*, 1 Hare, 207; 1 Hall & T. 329; 1 Mac. & G. 242, 533. The subject-matter of an act of parliament alone, without any preamble, has been relied upon for restraining the operation of general words. (*In re Bruce*, 2 Cro. & J. 436; *Arnold v. Arnold*, 2 My. & Cr. 256.) The preamble of a statute cannot control a clear

and express enactment; but the plain intent of the legisla- 8 & 9 VICT.
 ture as expressed in the preamble, and the nature of the mis- c 16
 chief which is sought to be remedied, may serve to give a defi- Sect. 1.
 nite and qualified meaning to indefinite and general terms.
Emanuel v. Constable, 3 Russ. 438; *Brett v. Brett*, 3
Addams, 218—224; *Foster v. Banbury*, 3 Sim. 40.)

The enacting words of an act of parliament are not always to be limited by the words of the preamble, but must in many instances go beyond it; yet on the sound construction of every act of parliament, the words in the enacting part must be confined to that which is the plain object and general intention of the legislature in passing the act, and the preamble affords a good clue to discover what that object was. (Lord *Tenterden*, C. J., in *Halton v. Cove*, 1 B. & Ad. 558.)

In construing acts of parliament the court must take into consideration not only the language of the preamble, or any particular clause, but of the whole act; and if, in some of the enacting clauses expressions are to be found of more extensive import than in others, or than in the preamble, the court will give effect to those more extensive expressions, if, *upon [*71]
 a view of the whole act, it appears to have been the intention of the legislature that they should have effect. (*Doe d. Bywater v. Brandling* 7 B. & C. 643; 1 M. & R. 600.) If any part of a statute be obscure, and other passages in the same act will elucidate that obscurity, recourse may be had to such context for that purpose. (*Rex v. Palmer*, 1 Leach, C. C. 352; 2 East, P. C. 898.) If there are several acts upon the same subject, they are to be taken together as forming one system, and as interpreting and enforcing each other. (*Ib.*; *Doe d. Tennyson v. Lord Yarborough*, 7 Moore 258; 1 Bing. 24.)

Whole act to
 be taken into
 considera-
 tion.

Where a general intention is expressed, and the act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception. (*Churchhill v. Crease*, 2 M. & P. 415; 5 Bing. 177, 180.)

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An act of parliament is to be construed according to the ordinary and grammatical sense of its language, if there be no inconsistency apparent in its provisions; and a proviso which on the face of the act is not inconsistent with the other enactments of it, is not to be limited in its effect by reason of local circumstances, not apparent on the face of the act, causing such inconsistency. But such proviso will not limit an express authority given by the act. (*Smith v. Bell*, 2 Railw. 77; 10 Mee. & W. 378.)

Ambiguous
words.

Ambiguous words in a private act of parliament incorporating a public company are to be construed against the company, [and in favor of private property, (*Scales v. Pickering*, 4 Bing. 448; 1 M. & P. 495.)] Where by a statute a special authority is delegated to particular persons affecting the property of individuals, it must be strictly pursued, and appear to be so upon the face of their proceedings. (*Rex v. Croke*, Cowp. 26.)

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Ambiguous words in an act of parliament authorizing a public company to take land by compulsory process, are to be construed against the company in favor of private property. (*Webb v. Manchester and Leeds Rail. Co.*, 1 Railw. C. 576; 4 My. & Cr. 116.)

Where a bargain is made between a company of adventurers and the public, the terms of the bargain are contained in the act. The company can claim nothing which is not clearly given. (*Kingston-upon-Hull Dock Co. v. La Marche*, 8 B. & C. 42.)

Where the language of an act of parliament obtained by a company imposing a rate or toll upon the public is ambiguous, that construction is to be adopted which would be most favorable to the interests of the public, and most against that of the company, because the company in bargaining with the public ought to take care to express distinctly what payments they are to receive, and because the public ought not to be charged, unless it be clear that it was so intended.

(*Gildart v. Gladstone*, 11 East, 685.) It is a sound general rule that a tax shall not be considered to be imposed (or at least for the benefit of a subject) without a plain declaration *of intent of the legislature to impose it. (*Kingston-upon-Hull Dock Co., v. Browne*, 2 B. & Ad. 58; *Leeds and Liverpool Canal Co. v. Hustler*, 1 B. & C. 424; 2 D. & R. 556; *Brittain v. Cromford Canal Co.*, 3 B. & Ald. 139; *Stourbridge Canal Co. v. Wheely*, 2 B. & Ad. 792; *Priestley v. Foulds*, 2 Railw. C. 422, see. p. 441; *Barrett v. Stockton and Darlington Railw. Co.*, 2 Railw. C. 443, see pp. 464, 465; 2 Man. & G. 134; 3 Man. & G. 956; 7 Man. & G. 870; 2 Scott, N. R. 337; 3 Scott, N. R. 803; 11 Cl. & F. 590; *Hall v. Grantham Canal Co.*, 13 Mees. & W. 114. See also 6 Scott, N. R. 831.)

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It is an established rule of law that all statutes *in pari materia* are to be taken together as if they were one law. (Douglass, 30; 2 T. R. 387, 586; 2 Man. & S. 210; Anon. Lofft. 398; Bac. Abr. Statute (I.), 2, 3; *Jones v. Smart*, 1 T. R. 53; *King v. Smith*, 4 T. R. 219; *Duck v. Addington*, 4 T. R. 447; *Gale v. Laurie*, 5 B. C. 156; *Crossley v. Arkwright*, 2 T. R. 609; *Rex v. St. John, Glastonbury*, 1 B. & Ald. 485; *Rex v. Croft*, 3 B. & Ald. 171; *Rex v. Fittleworth*, Burr. S. C. 238; *Rex v. Gwenop*, 3 T. R. 133; *Rex v. North Collingham*, 1 B. C. 582). If it can be collected from a subsequent statute *in pari materia* what meaning the legislature attached to the words of a former statute, this will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. (*Morris v. Mellin*, 6 B. & C. 454. See 7 B. & C. 99.)

In pari materia,

Words used in an act of parliament consolidating other acts may have a different meaning from that of the same words when used in any one of the acts comprehended. (Per Coleridge, J., *Reg. v. Justices of Kent*, 2 Q. B. R. 692.)

Consolidation acts.

The distinction has long subsisted in the construction of Directory

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and impera-
tive statutes.

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acts of parliament, between statutes *directory* and statutes *imperative*. An early instance of a statute being construed directory occurs, where it was held that the time appointed for the choice of overseers need not be observed to the letter, and that the choice of overseers on a day not being "in Easter week, or within one month after," as required by 43 Eliz. c. 2, s. 1, may be supported. *Rex v. Sparrow*, 2 Str. 1123; see *Margate Pier Co. v. Hannam*, 3 B. & Ald. 266; *Rex v. Pole*, 2 Selw. N. P. 1071, n.; *Rex v. Mayor of London*, 2 Man. & R. 36, see p. 63; Co. Litt. 360 a; 1 Peckw. El. C. 45; *Rex v. Woolstanton*, 1 Bott. 610.) There is a known distinction between circumstances which are of the essence of a thing required to be done by an act of parliament, and clauses merely directory. (*Rex v. Loxdale*, 1 Burr. 445.) Words that are clearly directory are to receive a different interpretation from those that are essential or conditional; as, for instance, where the words are negative, providing that the book or other document shall not be received in evidence, unless certain formalities have been previously observed. (*Southampton Dock Co. v. Richards* 1 Scott, N. R. 239; 2 Railw. C. 215.) By the Southampton Dock Act, 6 Will. 4, c. xxix. s. 84, it is provided that in an action for calls, in order to prove that the defendant was a

[*73] *proprietor of such shares in the undertaking, as alleged, the production of the book in which the secretary of the company is by that act directed (sect. 89) to enter and keep a list of the names and additions and places of abode of the several proprietors of shares, with the number of shares they are respectively entitled to hold, shall be *prima facie* evidence that such defendant is a proprietor, and of the number or amount of his shares therein. Sect. 89 requires the company from time to time to cause the names, additions and places of abode of the persons from time to time entitled to shares, with the number of their shares, and amount of subscriptions paid thereon, and the proper number by which every such share shall be distinguished, to be entered in a book to

be kept by the secretary. It was held that the provision as to the making the entries is only directory, and that an omission or irregularity in the entries in the book, relating to other shareholders, does not render the book inadmissible against the defendant, as being the book kept under the act. (Ib.) The distinction between a directory and imperative statute appears to be this—a statute is to be construed to be *directory*, when its provisions contain mere matters of direction; but when these matters of direction are followed by such words “or in default thereof every such lease, &c. to be null and void to all intents and purposes,” it is to be construed as *imperative*. (*Pearse v. Morrice*, 4 Nev. & M. 48; 2 Ad. & E. 84.) Negative words will have the effect of making the provisions of a statute imperative. (*Rex v. J. of Leicestershire*, 7 B. & C. 6; 9 D. & R. 772.) The words of an act were held to be peremptory, and not merely directory, which enacted that the forms of proceedings set forth in the schedule annexed *shall be used* (not the usual words *shall and may*) on all occasions, with such additions or variations *only* as may be necessary to adapt them to the particular exigencies of the case. (*Davison v. Gill*, 1 East, 64. See *Chapman v. Milvain*, 5 Exch. 61, and cases there cited.) The following words in the Marriage Act, 4 Geo. 4, c. 76, s. 16, were held to be directory. The Act provides that “the father, if living, of any party under twenty-one years of age (such party not being a widower or widow), or, if the father shall be dead, the guardian or guardians, &c. shall have authority to give consent to the marriage of such party; and such consent is *hereby required* for the marriage of such party so under age, unless there shall be no person authorized to give such consent.” Lord Tenterden, C. J., in giving judgment, said, “the language of this section is merely to *require* consent; it does not proceed to make the marriage void if solemnized without consent. Then another section declares that certain marriages shall be null and void, and a marriage by licence is not specified.” (*Rex*

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v. Inh. of Birmingham, 8 B. & C. 29; 2 Man. & R. 230.)

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So where a statute said that certain contracts for lighting a town should be signed by the commissioners, or any three of them, or by their clerk, it was held that the provision was directory only. By an act for paving, lighting, &c. the township of Birkenhead in the county of Chester, the commissioners for carrying the *act into execution, were empowered from time to time to enter into any contract or contracts for the performance of any of the works by the act authorized to be done, or for furnishing any materials, &c. for the performance thereof, or for any other of the purposes of the act, with any persons who should be willing to undertake and engage in the same; provided always, that no such contract should be made for a longer term than three years from the making thereof; and before any such contract should be entered into, ten days' public notice at least should be given, in order that persons may make proposals to the commissioners at a time and place in such notice to be specified; and all such contracts should specify the several works to be done, and the prices to be paid for the same, and the times when the works were to be completed, together with the penalties to be incurred in the case of non-performance; and the same shall be signed by the commissioners, or by any three of them, or by their clerk, and also by the person or persons contracting to perform such works respectively; and copies of the contract should be entered in a book to be kept for that purpose by the clerk to the commissioners; it was held that the proviso in this clause applied to the duration of the contract only, and that the subsequent provisions were directory only, and not conditional; and that a contract, signed otherwise than in the manner therein pointed out, was not therefore void. (*Cole v. Green*, 7 Scott, N. R. 682; Law J. 1844, C. P. 30.) In *Corrigal v. London and Blackwall Railw. Co.*, 5 Man. & G. 219; 2 Dowl. N. S. 851; 3 Railw. Ca. 411; and in *Re London and Greenwich Railw. Co.*, 2 Ad. & E. 678; 4 Nev. & M. 458; provisions in the acts, as to the separate assessments of purchase-money and

compensation for damage, were held to be directory. See 8 & 9 Vict. c. 16.
note on compensation, 8 & 9 Vict. c. 18, s. 16.

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By a private act, the business of a company thereby incorporated was to be carried on by *twelve directors*, five of whom were to be a *quorum*. There were provisions in the act as to the election of new directors in case of death, &c. The directors were authorized to make calls, and in case of non-payment the company had power to sue. An action having been brought for calls, the defendant in March suffered judgment by default. In Trinity term following he applied to set aside the judgment, upon the ground that at the time the calls were made there were only seven directors, and that he had only lately learnt that fact. The court refused the application, holding that the enactment as to the number of directors was only directory, and that if the fact of the number not being completed was an answer to an action for the calls, it ought to have been pleaded, and that the defendant could not apply to the equitable jurisdiction of the court to set aside a judgment upon grounds which might have been pleaded as an answer to the action. (*Thames Haven Dock Co., v. Rose*, 4 Mann. & G. 552; 2 Dowl. N. S. 104; 5 Scott, N. R. 524; Law J. 1843, C. P. 90.)

*The provision in the General Inclosure Act, 41 Geo. 3, c. 109, s. 1, that the commissioners' oath, and the appointment of any new commissioner, shall be annexed to and enrolled with the award, is merely directory. *Casamajor v. Strode*, 2 My. & K. 706; 5 Sim. 87.)

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Some forms prescribed for the government of a corporation may be imperative, and others directory only. *Foss v. Harbottle*, 2 Hare, 489; 7 Jur. 163.)

A party interested in the subject-matter of a private act of parliament will have his rights affected by its provisions, although it may have been introduced and passed without notice duly given to him, as required by the standing orders of parliament. (*Edinburgh and Dalkeith Railw. Co., v.* Party affected by private act without notice.

8 & 9 VICT. *Wauchope*, 8 Cl. & F. 720 ; 3 Railw. C. 232, see pp. 265,
 c. 16. 266. See *Cromford Railw. Co., v. Lacey*, 3 Y. & J. 80.)
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An act of parliament for the formation of a railway, containing a declaration that it is to be judicially taken notice of as a public act, cannot be treated or construed as a private assurance. (*Hargreaves v. Lancaster and Preston Railw. Co.*, 1 Railw. C. 416.) On the effect of an act conferring private rights, although declared to be a public act, see *Prince's case*, 8 Rep. 1 ; *Perchard v. Haywood*, 8 T. R. 468 ; *Hesse v. Stevenson*, 3 Bos. & P. 565 ; *Perry v. Skinner*. 2 Mees. & W. 471 ; 19 Vin. Abr. tit. "Statute" (D.) pl. 5, p. 500.

Copies of
 private acts
 printed by
 queen's
 printer ad-
 missible as
 evidence.

All copies of private and local and personal acts of parliament, not public acts, if purporting to be printed by the queen's printers, shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed. (8 & 9 Vict. c. 113, s. 3.)

Effect of
 clause de-
 claring that
 act shall be
 public.

If an act of parliament be of a private nature, it does not derive any additional weight or authority from having a clause declaring it to be a public act. The usual clause for effecting this is, "that this shall be a public act, and shall be judicially taken notice of as such." It must still be construed as a private act, the only object of the proviso making it a public act is, that it may be judicially taken notice of, and to save the expense of proving an attested copy. Such acts, passed on the petition of individuals, are to be construed as private agreements between parties. (3 Bos. & P. 565 ; 8 T. R. 468 ; 2 T. R. 705 ; 2 Bl. Com. 346.)

A local act with a clause declaring it to be a public act, and that it shall be taken notice of as such by all judges &c. without being specially pleaded, need not be proved either to have been examined with the parliament roll, or to have been printed by the king's printer. (*Woodward v. Cotton*, 1 C. M. & R. 44 ; *Beaumont v. Mountain*, 10

Bing. 405 ; 4 M. & Scott, 177 ; see *Brett v. Beales*, Moo. 8 & 9 VICT. c. 16. & M. 421.) A local act of parliament, though containing Sect. 1. a clause making it a public act, is not public notice of its powers over land therein mentioned. (*Ballard v. Way*, 1 Mees. & W. 520 ; 2 Gale, 61.)

It was held by *Shadwell*, V. C., that although a private *act of parliament may, for many purposes, be treated as a sort of private assurance in a family transaction (see *Provoost of Eton v. Ep. Winton*, 3 Wils. 483 ; *Townley v. Gibson*, 2 T. R. 701 ; *Lucy v. Lavingsston*, 1 Vent. 176) : yet such doctrine cannot be at all applicable to the case of an act of parliament, which besides its general public nature manifested in every section, concludes with the legislative declaration that it is to be taken as a public act, and judicially taken notice of as such by all judges, justices and others. (*Hargreaves v. Lancaster and Preston Junction Railw. Co.*, 1 Railw C. 430. See *Penney v. Great Western Railw. Co.*, Horn & H. 253.) Whether an act of parliament is to be deemed a public act, binding on all the Queen's subjects, or merely a private act, depends upon the nature and substance of the case, and not upon the technical consideration whether the act does or does not contain a clause that it shall be deemed a public act. (*Dawson v. Paver*, 5 Hare, 415.) (*76)

(1) The act incorporating the Ohio and Indianapolis Rail Road Company is a private act. *The Ohio &c., Rail Road Company, v. Ridge*, 5 Blackford, 78.

Private acts of parliament are to be construed according to the intention of the parties, which intention must be collected from the words used by the legislature, without doing violence to their natural meaning. (*Townley v. Gibson*, 2 T. R. 701.) It is obvious that whatever rules have been established relating to the exposition of deeds must be applicable so far as they are founded upon the universal principles of criticism, to all contracts and laws which profess to be written in the ordinary language of men ; and that the same rules must be applicable, so far as concerns the

Private acts
how to be
construed.

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description and incidents of the subject-matter, more especially to such of those contracts and laws as differ from deeds of conveyance only in the absence of some formalities, and in the greater solemnity of their sanction. (Burton on Real Property, pl. 613.)

Known
principles of
law must be
applied in
construction
of statutes.

Courts of law and equity can only enforce the rights of parties under acts of parliament by the application of their known rules and principles; if they are inadequate to the purpose, the legislature alone can supply the defect. In *Weale v. West Middlesex Waterworks Co.*, 1 Jac. & W. 371, 372, Lord *Eldon*, C., observed, where an act of parliament directs things to be done, or to be forborne to be done, the legislature either provides the means for compelling such acts to be done, or restraints to prevent those being done which are to be forborne to be done, or if the act contains no provisions of either kind, the legislature acts upon the supposition that the enactments are complete as far as they go, and that the laws of the courts of common law and equity are sufficient to enforce the right which the king's subjects may have derived under the act. But if it turns out that the courts of law can give nothing but damages, and that the courts of equity cannot interfere to compel a specific performance of the acts required to be performed, or restrain the execution of acts, which are not to be done, or if the powers of both taken together can give the king's subjects nothing but an action for damages, it is a defect *which, whether it proceed from mistake on the part of the legislature, or from negligent inattention, no court can supply. The legislature has not extended that authority to courts of justice; it has not said they can legislate, but that the act is to be carried into execution by the known rules of law and equity. What the legislature has directed to be done, or may have prohibited, the courts, as far as their known rules and principles will permit, will endeavor to enforce: but if their known rules will not supply a remedy, if the legislature has mistaken its way, no court of justice

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can supply the deficiency. Where the court sees what the intention of the legislature is, it is its duty to endeavor to find out, either from the enactments themselves, or from the application of the known rules of law and equity, the means of enforcing what the legislature intended should be carried into execution. Where a company was established by act of parliament for supplying the inhabitants of several districts with water, upon such terms as they should mutually agree upon, and a subsequent act provided that the company should only demand reasonable sums, it was held that a court of equity has no jurisdiction, upon an offer to pay either a reasonable price or that which was originally agreed upon, to compel the company to continue a supply to any inhabitant beyond the term of his contract, or to restrain them from discontinuing such supply until the decision of the question by a trial at law. (*Weale v. West Middlesex Waterworks Co.*, 1 Jac. & W. 358.)

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Definitions of Words.

II. And with respect to the construction of this act, and of other acts to be incorporated therewith, be it enacted as follows:

The expression "the special act" used in this act shall be construed to mean any act which shall be hereafter passed incorporating a joint stock company for the purpose of carrying on any undertaking, and with which this act shall be so incorporated as aforesaid; and the word "prescribed" used in this act, in reference to any matter herein stated, shall be construed to refer to such matter as the same shall be prescribed or provided for in the special act; and the sentence in which such word shall occur shall be construed as if instead of the word "prescribed" the expression "prescribed for that purpose in the special act" had been used; and the expression "the undertaking" shall mean the undertaking or works, of whatever nature, which shall by the special act be authorized to be executed (b).

Interpretations in this act:

"The special act."

"Prescribed."

"The undertaking."

(b) The company will be incorporated by a special act of incorporation.

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 c. 16.
 Sect. 1.
 [78] *making railways usually recite that the making of the proposed railway would be a great public advantage, and that certain persons thereafter named with other persons are willing at their own expense to carry into execution the said undertaking, but the same cannot be effected without the authority of parliament, and then enacts, that the three consolidation acts shall be incorporated with and form part of the special act, and gives a short title to such act, and enacts, that the persons named and all other parties who have already subscribed or shall thereafter subscribe to the said undertaking, and their executors, administrators, successors and assigns respectively, shall be united into a company for the purpose of making the said railway with proper works and conveniences connected therewith, according to the provisions of the thereinbefore mentioned acts and that act, and for the purpose aforesaid shall be incorporated by the name of "The ——— Railway Company," and by that name shall be a body corporate, with perpetual succession, and shall have power to purchase and hold lands for the purpose of the said undertaking, within the restrictions therein and in the thereinbefore mentioned acts contained. (1)

Construction
 of Statutes.

(1) The term, "farm crossing," in the general Rail Road Law of New York, was held to mean a passage under, as well as over the Rail Road, and that it was the right of the owner to have the crossing upon his own land. *Wheeler v. The Rochester and Syracuse Rail Road Company*, 12 *Barbour*, 227.

The act of 1848 of New York requiring Rail Road Companies to have cattle guards at all wood crossings, does not apply to streets in cities and villages. *Vanderker v. The Rensselaer & Saratoga Rail Road Company*, 13, *Barbour*, 493.

A provision in the charter of a Rail Road Company for the forfeiture of a given sum of money, in case the Company shall fail to locate their road in the manner pointed out in the act, though assented to by the company, does not constitute a case of contract, but of *penalty* which the Legislature may remit at pleasure. *State*

v. *Baltimore and Ohio Rail Road Company*, 12 Gill & John. 8 & 9 VICT. c. 16.
son, 399.

If land is conveyed to a Rail Road Corporation, upon condition that it should revert to the grantor, upon the *abandonment* of the road; and the Road was sold by the State under mortgages given the State, and the work was by new Companies, chartered for the purpose, carried forward, and the road completed; it was held, there was no such *abandonment*, as to entitle the grantor to claim the reversion. *Harrison v. Ohio & Lexington Rail Road Company*, 9 B. Monroe, 470. Construction of Statutes.

Where the proprietor of a wharf in the Harbor of Boston, was authorized by an act of the Legislature, to extend the same into the channel, to the line of the harbor; and before any extension thereof, in pursuance of such act, the Legislature incorporated a Rail Road Company, with authority to locate and construct a Rail Road across and over the flats, between such wharf and the line of the harbor; it was held, that the act authorizing such extension, operated as a *grant* to the proprietor of the wharf, and was not a mere license revocable at the pleasure of the legislature, and revoked by the act incorporating the Rail Road Company. *Fitchburgh Rail Road Company v. Boston & Maine Rail Road Company*, 3 Cushing, 58.

And private acts of incorporation, which confer power to subject private property to public use, should be strictly construed. *Moorhead v. Little Miami Rail Road Company*, 17 Ohio, 340. In illustration of the rule, we have this case. The act of incorporation for a Rail Road Company gave them "authority to vary the route, and change the location after the first selection had been made." 1. Whenever a better and cheaper route could be had; and 2. Whenever any obstacle to continue said location was found, either by difficulty of construction, or procuring right of way at reasonable costs.

Held, that authority was not thereby conferred upon the corporation to re-locate their Road, after completing it upon the first location, and to take private property for the uses of the Road. *Moorhead v. Little Miami Rail Road Company*, 17 Ohio, 340.

And in Connecticut, the rule has been well laid down in the following language:—

8 & 9 VICT.
c. 16.

Construction
of Statutes.

"Statutes relating to subjects in which the public at large are interested are to be expounded largely and beneficially for the purposes for which they are enacted; while statutes which are applicable to private grants to individuals, of powers and privileges, conferred and to be exercised with a special reference to their own advantage, although involving in their exercise incidentally benefits to the community, generally are to be construed strictly, as against the grantees. *Bradley v. New York & New Haven Rail Road Company*, 21 *Connecticut*, 294.

What facts
will not con-
stitute a per-
petual con-
tract.

The Legislature, in the act to incorporate the Boston and Lowell Rail Road Corporation, having reserved a power to authorize any other Rail Road Company to enter upon and connect with the Boston and Lowell Rail Road, paying for the right to use the same, and complying with such regulations in relation to the use thereof, as might be established by the Boston and Lowell Rail Road Corporation; and having subsequently incorporated the Andover & Wilmington Rail Road Company, with authority to enter upon, and use the Boston and Lowell Rail Road, on the terms and conditions provided in their charter; the Andover & Wilmington Rail Road Company entered accordingly upon the Boston & Lowell Rail Road, and connected their Road therewith; and the Boston & Lowell Rail Road Company thereupon made expensive and permanent arrangements for the accommodation of the Andover & Wilmington Rail Road Corporation, and for the carriage of their passengers and freight, and carried the same accordingly for such compensation, as was established and agreed upon by the two companies. The Andover & Wilmington Rail Road Company afterwards, and by the authority of the Legislature, extended their Road from a point in the same, near its connection with the Boston & Lowell Road to Boston and from thenceforward, carried all their passengers and freight destined for Boston and intermediate places over the newly constructed Road, and discontinued the use of the Boston & Lowell Road for the carriage of such passengers and freight. In an action on the case, by the Boston & Lowell Rail Road Company, against the Andover & Wilmington Rail Road Company, for diverting passengers and freight from the Road of the former and discontinuing the use of the same by means of such newly constructed Road, it was held, that the

entry and connection of the Andover & Wilmington Rail Road Company, upon and with the Boston & Lowell Rail Road, did not constitute a permanent and perpetual contract with the Boston & Lowell Rail Road Company that the Andover & Wilmington Rail Road Company should forever enter upon and use the Road of the former; and that no such contract could be inferred from any supposed legal obligation on the part of the Boston & Lowell Rail Road Corporation to provide accommodation for the passengers and freight thus brought upon their Road. *Boston & Lowell Rail Road Company, v. The Andover & Wilmington Rail Road Company*, 5 Cushing, 375.

8 & 9 VICT.
c. 16.

Construction
of Statutes.

A provision in the charter of a Rail Road, that no Rail Road, other than the one thereby established, shall be authorized to be made from one termination to any place within five miles of the other termination, is not infringed by an act authorizing the construction of a Rail Road from the first mentioned termination to a point, not within five miles of the other termination; although within the space included by two straight lines drawn from the first termination to points five miles on each side of the other termination. *Ib.*

What will
not infringe
a previous
grant.

A right to take tolls, freights and fares, can never arise from *implication*; but it must be created by express grant in the charter of incorporation; and the charters conferring this right will always be construed most favorably to the public. *Camden & Amboy Rail Road Company v. Briggs*, 2 New Jersey, 623.

And it was held, that the 16th section of the charter of the above company, which restricts the rates of Tolls and Fares, applied to every part of the Road between New York and Philadelphia. *Ib.*

But it is not necessary, that all the powers of a Corporation should be by *express grant*. They may be given by *implication*.

Where the charter of a Rail Road Company granted to the corporation "all powers, privileges and immunities," which are or may be necessary to carry into effect the objects and purposes of the charter; it was held that, by *implication*, the company must have power in a Constitutional manner to sequester both land and water, to take property both corporeal and incorporeal, or to interfere with privileges, which may lie in its way, so far as may be necessary for the completion of their works. *Enfield Toll Bridge Com-*

8 & 9 VICT. c. 16. *pany, v. H. & N. H. Rail Road Company*, 17 *Connecticut*, 454. This implication of power may result from the language

Construction
of Statutes.

of the act, or from its being shown, from the application of the act to the subject matter of it, that the road could not be laid in any other line, by reasonable intendment. *Springfield, v. Connecticut River Rail Road Company*, 4 *Cushing*, 63. *White River Turnpike Company, v. Vt. Central Rail Road Company*, 21 *Vermont*, 595-6.

Powers
granted to
R. R. Cor-
porations

The Board of the Directors of the Baltimore and Ohio Rail Road Company, having applied \$146,816 of the net revenue of the Company for the year 1846, to the reconstruction of the Road between Harper's Ferry and Baltimore, and for machinery and other purposes, leaving only a cash balance of \$90,504; and designing to reimburse the stockholders for the amount so applied, in November, 1846, declared a dividend of \$3 per share payable on and after the 20th of that month, as follows: to all stockholders of less than 50 shares, cash; to all stockholders of 50 shares and over, one dollar per share in cash, and two dollars per share in the company's bonds, bearing interest payable quarterly, and redeemable in 20 years, and deliverable to the stockholders at the office of the company. The State being a stockholder to the amount of 5,000 shares, refused to take the bonds, and brought assumpsit to recover the amount of three per cent. in money.

Held that by the 14th sec. of its charter (act of 1836, chap. 123,) the President and Directors of said company were invested with all the rights and powers necessary to the construction and repair of a Rail Road from the City of Baltimore to the Ohio River; and had a right to expend any part of its revenue for the reconstruction of the Road; that the company could make the expenditure absolutely, and without being bound to refund to the stockholders in their discretion; that under the 19th Section of the charter, the Directors were bound to divide such part of the net profits as they deem proper, and that their judgment of what was proper was conclusive upon the stockholder, and that they could apply any portion of the net profits not divided to any legitimate purpose of the company. *State v. Baltimore & Ohio Rail Road Company*, 6 *Gill*, 363.

In all questions of power, arising under an act of assembly granting a franchise of this description, the test of the existence

of the power, is to be found in the inquiry whether the same is expressly granted, or whether it is incidental to any express grant of power, and necessary to its accomplishment. *Ib.*

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c. 16.
Construction
of Statutes.

The established rule that every corporation is limited in its powers by the object to be accomplished, and that if there is a specification of the means for the accomplishing of a particular object, then such specification excludes all others, is admitted; but is not considered as applicable to this case. *Ib.*

[78]

The 13th Section of this charter, giving the power to increase the capital stock on the terms therein mentioned and to borrow money, however it may exclude other means of accomplishing the construction of the road, is no limitation of the grant of all powers, limited only by their necessity conferred by the 14th Section. *Ib.*

The design of the 19th Section was to define what was to be the subject of the dividend and to prescribe the mode of dividing among the stockholders, and to allow a dividend from time to time, if the President and Directors deemed it proper; but if in the honest discharge of their duties, they deemed that the net profits should be otherwise applied to further the objects of the act of incorporation, they were at liberty to withhold a dividend. *Ib.*

The 18th Section, authorizing the purchase of motive power &c., with the funds of the company, to be placed on any Rail Road constructed by them under the act, confers the same authority as if there had been a general power to purchase, without any reference to the funds of the company, and does not militate against the construction above given to the 14th Section. *Ib.*

The true construction of the 9th Section of the act of 1835, chap. 395, which guarantees to the State the interest on the installments advanced by her on the stock subscribed for under that act, is that this guaranty is to be satisfied out of the gross profits of the Company; and this guaranty is in no manner impaired by the act of 1838, chap. 386. *Ib.*

The State was not bound to receive these bonds, (though if accepted they would have been valid in her hands,) but might treat the dividend so far as they proposed their delivery as illegal; and she has a remedy commensurate with the injury thereby sustained, but not in the form of a general *indebitatus assumpsit*. *Ib.*

By instituting this form of action, the State affirmed the dividend

8 & 9 VICT. and must take it as it is. Hence she cannot recover the \$15,000 in
 c. 16. this suit, because the dividend declared did not profess to be a div-
 Construction of Statutes. idend to that extent in money. *Ib.*

[78]

The relation of trustee and *cestui que trust* exists in a qualified sense as between the directors and stockholders ; and the funds in the hands of the former in which the latter have an interest, can not be sued for in this form of action, unless a dividend has been declared. The charter of the Company does not justify the discrimination made between the large and the small stockholders ; giving to the latter 3 per cent. in money, and to the former money and bonds. *Ib.*

There can be no recovery in this case for that per cent. on the dividend payable in money, for the want of a demand before action brought. *Ib.*

In all questions of power, arising under the act of a Legislature granting a franchise like that of a Rail Road Corporation, the test of the existence of the power, is to be found in the inquiry, whether the same is expressly granted, or whether it is *incidental* to any express grant or power, and necessary to its accomplishment. *State of Maryland v. Baltimore & Ohio Rail Road Company*, 6 Gill, 363.

Every corporation is limited in its powers, by the object to be accomplished ; and if there is a specification of the means for the accomplishment of a particular object, then such specification excludes all other means. *Ib.*

A power to take land for the purposes of a Rail Road, gives by implication a right to remove a dwelling house on the route. *Brocket v. Ohio & Pennsylvania Rail Road Company*, 14 Pennsylvania, 241.

Where a Rail Road Company takes land for a Rail Road, by the license of the owner, to the same extent as they would have a right to do under their charter ; the company have a right to make culverts and ditches in suitable places, and in a convenient manner, even though it was necessary to extend the ditches upon the land of the person granting the license, beyond the limits of the Rail Road ; and this upon the principle that the grant of a thing includes the means necessary to attain it ; and that the corporation,

under the license, might deepen and widen, in the land of the party, without the limits of the Rail Road the bed of a mountain stream, over which the Rail Road was located, it being necessary to secure the Rail Road from damage, and also the property of the landholder ; and it would seem the Corporation had power to perform the aforesaid acts under their charter, and the Massachusetts Revised Statutes, chap. 39. *Babcock, v. Western Rail Road Corporation*, 9 Metcalf, 553. 8 & 9 Vict.
c. 16.
Construction
of Statutes.

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Ambiguous words in a charter, are to be construed most strongly against the Corporation. *Perrine, v. Chesapeake & Delaware Canal Company*, 9 Howard, 172. And a corporation created by Statute can exercise no powers but those which are expressed or necessarily implied. *Id.*

This arises from a principle of strict construction. See also *Stormfeltz v. Manor Turnpike Company*, 13 Penn. (1 Harris) 555.

Incorporations of Rail Road companies are to be treated as private acts. See *the Ohio Rail Road v. Ridge*, 5 Blackford, 78.

Where a Statute gives a city corporation power to regulate the running of Rail Road Cars within the limits of the Corporation, it has power by implication to prohibit the propelling of cars by steam, through any part of the City. *Buffalo Rail Road Company v. Buffalo*, 5 Hill, 209 ; and by construction it was held that the South Carolina Canal and Rail Road Company had no right by their charter, or by the act of 1828 or 1832, to use steam power in propelling cars on that part of their road connecting Line street with Mary street on Charleston Neck. *State v. Tupper, Dudley*, 135.

A charter to construct a Rail Road "on the place of shipping lumber," on a tide water river, gives a right to extend the road across the flats and over tide water to a point at which lumber may be conveniently shipped. *Veasey v. Calais Rail Road Company*, 30 Maine, 498.

And where a Rail Road Corporation were authorized by their charter to take any lands or right of way required for the purpose of constructing their Road, at a valuation by Commissioners ; it was held, under this provision, that land, at the terminus of the road, might be taken for the purposes of a depot. *Nashville & Chattanooga Rail Road Company v. Cowardin* 11 Humphrey, 483.

8 & 9 VICT. c. 16. By the Statutes of Massachusetts of 1838, the *annual payment*, which the Western Rail Road Corporation is required to make from its income to the sinking fund, is to be made from its *net income*; and if its net income in any one year is not sufficient for such payment, the corporation cannot by a fair construction of the act, be required to make up the deficiency from the income of succeeding years. *Opinion of the Judges of Massachusetts*, 5 Metcalf, 596.

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Powers of
the Compa-
ny.

Words in a charter, "that it should be lawful for the company to make the proposed railway;" have been construed to be *permissive*, and that they were not compulsory upon the company to make the railway; and that although the company had made a part, yet they could not be compelled to make the remainder. *The York & North Midland Railway Company, v. Regina*, 18 Eng. Law & Equity Rep. 199.

A railway company had power "to make and maintain the railway and works on the line and upon the lands delineated in the parliamentary plan, and described in the books of reference, and to enter upon, take and use the said lands or such of them as should be necessary for that purpose;" but they were not to enter upon, take, or use any of the land or property of a certain pre-existing railway company, or in any matter alter, vary, or interfere with that railway or any of the works appertaining thereto, save only for the purpose of effecting the junction thereby authorized in the manner in the said act authorized, and not otherwise; one of the clauses of the act giving certain powers to the company for effecting a junction with the pre-existing railway:—

Held, that there being nothing to show that it was absolutely necessary for the company in order to effect the junction, it had no powers to take as owners, certain lands over which the line of the pre-existing railway actually passed; but there was a right to enter upon such lands by way of easement; for the purpose of effecting the junction. *Oxford, Worcester &c., Railway Company v. South Staffordshire Railway Company*, 19 Eng. Law & Equity Rep. 131.

In May, 1836, a Rail Road Company was chartered, to construct a Railroad from the Northern line of Connecticut, to the city of B. In March, 1837, the city of B. voted to aid in the construction of the Road, by subscribing \$100,000 to the capital stock of the company, and appointed an agent to make such subscription; and also agents to raise that sum by loans, at an interest not exceeding 6 per cent. per annum, with power to pledge the credit of the city for it, by issuing its securities. The subscription was made on the books of the corporation, and was confirmed on the 25th March, 1837 by the city, when a further subscription of \$50,000 was authorized, and the agents directed, as before to raise the requisite funds. At the same time the city voted to present a petition to the legislature to pass a law to validate its former proceedings on this subject, and praying that such further powers might be conferred upon the city, as should be necessary to carry those proceedings into effect. Such petition having been presented, the Legislature in May, 1838, passed an act to confirm, ratify and make obligatory, on said city and the citizens thereof, all their former proceedings in the same manner, and to the same extent, as if all the necessary powers for that purpose had been conferred by the charter of the city, and also empowered the city, at any legal meeting warned for that purpose, to adopt such other measures as in their opinion might be necessary to carry into effect all the former proceedings; and to provide for the negotiation, and payment of the subscriptions, loans and securities, and providing that the securities which had been or might be issued should be obligatory upon the city, *to all intents and purposes*; and might be enforced to the same extent, and in the same manner, as debts against towns could be, under the existing laws of the State.

This act was accepted and approved by the freemen of the City, agreeably to a proviso in it. In an action of debt on one of the bonds of the city, executed by its agents duly appointed and empowered under the seal of the Corporation, and issued for stock in the Rail Road Company, to recover interest payable semi-annually, which had become due; it was held first, that the act of 1838, (aside from any unconstitutional infirmity) gave validity to the previous proceedings of the City and its agents, whether

8 & 9 VICT.
c. 16
Constitutional Law.

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8 & 9 VICT. they were otherwise valid or not ; 2d, that such act was not inoperative ; as being retro-active, unjust, or unconstitutional. *City of Bridgeport v. Housatonic, Rail Road Company*, 15 Connecticut Law. *Cut*, 475.

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The late case of *Sharpless et al v. The Mayor &c., of Philadelphia*, decided at the Sept. Term of the Supreme Court of Pennsylvania, involves the discussion of most important Constitutional questions. The questions came up upon an application by some of the taxable inhabitants of the city of Philadelphia to restrain the city Corporation from subscribing to the stock of two Rail Road Companies, no part of either of which roads were within the chartered limits of the city ; and the question for decision involved the Constitutional power of the Legislature to authorize the subscriptions for stock, (which had been made ;) without the consent of a majority of those whose persons and property would become liable to seizure in satisfaction of the debts occasioned by such subscriptions.

The case was very fully examined ; and the constitutionality of the Law sustained by a divided opinion of the Court ; and it must be admitted the opinions are able, both the opinion of Ch. J. Black, and the dissenting opinions of Justices Lowrie and Lewis ; and men may differ as to which side has the right of the argument. See *Harris Reports* ; and also *American Law Register*, vol. 2, pages 27, 85.

So an act empowering the city of Louisville, to subscribe for stock in a Rail Road, and to pay the same by taxation, the tax payers being entitled to certificates of stock ; was held, in Kentucky, constitutional. *Talbot v. Dent*, 9, *B. Monroe*, 526.

The same decision was made relative to an act empowering certain County Courts, to subscribe for stock in a Turnpike company, for and in behalf of their counties, though it implied a power of taxation. *Justices of Clark County Court v. The P. W. & Sh. R. Turnpike Company*, 11, *B. Monroe*, 145.

So in Ohio, under their Constitution of 1802, it was held the Legislature, with the assent of a majority of the electors of the County, might empower the County Commissioners to subscribe for stock in a Rail Road ; and that a condition attached to the

act; that it should be approved of by a vote of the County before subscriptions were made, would not render it unconstitutional. *Per* 8 & 9 Vict. c. 16
Hitchcock Ch. J., 20 Ohio Appendix A.

Constitution-
al Law.

There can be no *Constitutional* objection to an act of a Legislature granting to a private Corporation the right to construct a bridge, a turnpike, or a Rail Road, *lateral to*, or *parallel* with one constructed or made by another private corporation under a previous grant of the Legislature (unless such previous grant is *exclusive* in its terms;) even though it be so near the former as to impair or even destroy its value; and this may be done without compensation being made for consequential damages. *Charles River Bridge v. Warren Bridge*, 11 *Peters* 420.

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Enfield Bridge Company v. Hartford & New Haven R. R. Co., 17 *Connecticut*, 454; *Mohawk Bridge Company v. Utica & Schenectady Rail Road Company*, 6 *Paige*, 544; *White River Turnpike v. Vermont Central Rail Road Company*, 21 *Vermont*, 594; *Turnpike Company v. Rail Road Company* 10 *Gill & Johnson*, 392.

The lateral Rail Road acts, as they are called, of Pennsylvania have been held Constitutional. *Harvey v. Thomas*, 10 *Watts*, 63 *Harvey v. Lloyd*, 3 *Barr*, 331; *Shoenberger v. Mulhollen*, 8 *Barr*, 134; and by the act 28th of March 1840, the right of making *lateral* Rail Roads in Pennsylvania, is extended to each and every county in the State. *Ib.*

In 1790 the Legislature of New York granted to A. the right to build a toll Bridge across Harlem River, and provided that no other Bridge or Ferry should be erected or maintained between the two places connected thereby, except for the private use of the inhabitants of the two places. In 1832 a Rail Road was empowered to cross the same River near the Bridge of A.; a bridge having been built previously for the use of the inhabitants, according to the reservation in the grant to A. the Rail Road Company purchased and used it for their Rail Road, which use diminished the receipts of A.'s bridge.

Held, that the charter to the Rail Road Company, and the use of the bridge for the Rail Road, were not a violation of the franchise granted to A., and that he could not restrain such use by injunction; but that the company might be restrained by injunction

8 & 9 VICT. c. 16. from allowing persons to pass the bridge, who were not authorized to cross by law. Held further, that the defendant could not set up, as a defence in a suit for an injunction, that the complainants had violated their franchise, and thus set it aside collaterally; and that the Rail Road Company being authorized to build a bridge for their Rail Road, might buy one already built, as they had done. *Thompson v. New York & Harlem Rail Road Company*, 3 *Sandford, Chan.*, 625.

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The charter incorporating the Richmond, Fredericksburgh and Potomac Rail Road Company, provided that in the event of the completion of the Road from Richmond to Fredericksburgh within the time limited in their charter, the General Assembly would not, for thirty years from the completion of said Rail Road, allow any other Rail Road to be constructed between Richmond and the city of Washington, or for any portion of said distance, the probable effect of which would be to diminish the number of passengers traveling between one city and the other, upon the Rail Road authorized by the act, or compel the company, in order to retain such passengers, to reduce the passage money; and subsequently the General Assembly passed an act authorizing the Louisa Rail Road Company to cross the track of the other Road at some distance from Richmond and to continue their Road to Richmond, unless the first company would allow the other company to transport passengers over their road at certain rates; and it was held by a majority of the Court, that this latter act was not an infringement upon the first charter, nor did it impair the obligation of the contract made between the General Assembly and the first company. *Richmond, Fredericksburgh & Potomac Rail Road Company v. Louisa Rail Road Company*, 13 *Howard*, 71; *McLean, Wayne and Curtis, Justices, dissenting.*

A Rail Road Corporation is as much subject to the general police regulations as is an individual; and a Legislature has the Constitutional right to pass police laws from time to time as the exigencies of the case may require, to regulate corporations in the exercise of their franchise, as the public safety may require. *Galena & Chicago Union Rail Road Company v. Loomis*, 13 *Illinois*, 548.

And the Legislature may inflict severe penalties upon a Rail Road Corporation for taking more than the legal rates of Tolls and

Fares, and the act would be no breach of the contract with the Corporation, and not void as an *ex post facto* Law. *Camden & Amboy Rail Road Company v. Briggs*, 2 *New Jersey*, 623. 8 & 9 VICT. c. 16.

Constitutional Law.

The general Rail Road law of New York (1848) sec. 44, made it the duty of all Rail Road companies, chartered under that act, to erect and maintain fences on the sides of their Rail Roads with openings, or gates, or bars, and farm crossings; and the 49th sec. made all the then *existing Rail Roads* within the State, subject to all the duties, liabilities and provisions, *not inconsistent with the provisions of their charters*, contained in certain sections of the law of 1848, one of which was the aforesaid section 44, requiring them to build and maintain fences, &c.; and it was held that the act of 1848 could not compel the Railway companies existing before the passage of the act to build fences, &c., where they had previously obtained the right of way, and had paid the landholders their damages; and though the Legislature had retained the right to alter and amend the charters, yet it was held this referred to some matter of public concern, as tolls, fares, &c. *Milliman v. The Oswego & Syracuse Rail Road Company*, 10 *Barbour* 87. But see the case of *Waldron v. The Rensselaer & Saratoga Rail Road Company*, 8 *Barbour*, 390; and in the case of *Lyman v. Boston & Worcester Rail Road Company*, 4 *Cushing* 288; it was held that the Massachusetts Statute of 1840, Chap. 85, making the proprietors of Rail Roads responsible for injuries from fire communicated from their locomotive engines, applies to Rail Roads established before as well as since the passage of the act, and extends as well to estates, a part of which is conveyed by the owner, as to those of which a part is taken by authority of Law for the purposes of a Rail Road.

The Legislature of Delaware passed a law in 1837, authorizing a Rail Road Company to erect a close bridge over White Clay Creek, and it was held constitutional, and that the owner of a mill above could maintain no action, though damage resulted to him from the loss of navigation, and the obstruction to the flowage of the water, if such bridge was made and kept up in conformity to the law, but if not, and special damage accrued, it was *actionable*. *Bailey v. Philadelphia Rail Road Company*, 4 *Harrington*, 389.

8 & 9 VICT. Where the obstruction of a navigable river was authorized by
 c. 16. the Legislature, an act afterwards passed, giving a right of action
 Sect. 2. against the Rail Road Company for such obstruction, and not accepted by the Corporation, was held to be a violation of their charter, and of the obligations of the contract with them, though for an unauthorized obstruction, a *remedy* by a summary action may be given. *Id.*

Constitutional Law.

[78] Indeed every substantial alteration of a charter without the consent of the Corporators is void. *The Commonwealth v. Cullen*, 13 *Pennsylvania*, 133.

Where under the charter of a Rail Road Company, the land damages had been assessed by a Sheriff's Jury, and the inquisition had been confirmed by the County Court, and the statute provided that the valuation so assessed, when paid or tendered to the landholders should entitle the company to the estate or interest therein, as fully as if it had been conveyed to them by the owner; it was held that an act passed after the inquisition of the Jury had been confirmed by the County Court, but before payment or a tender of the damages assessed, directing the court to set aside the inquisition and order a new one, was not unconstitutional, as impairing the obligation of a contract. *Baltimore & Susquehanah Rail Road Company v. Nesbit*, 10 *Howard* 395.

Where a charter of a Rail Road is granted between two given points, and it contained no provisions exempting them from taxation, and another charter was granted to another Company for a Rail Road extending from one of those points to another given point, and their shares were declared personal estate, and exempt from taxation by the charter, and the two Companies were afterwards incorporated into one; it was held that that portion of the road, which had been exempt from taxation for its shares under its individual charter became liable to taxation, and that a law imposing a tax on that part of the road was constitutional, it not impairing the obligation of a contract. *Philadelphia and Wilmington Rail Road Company v. Maryland*, 10 *Howard*, 376.

The acceptance of the act combining the two roads in one, operated as a waiver of the exemption from taxation, guaranteed under the individual charter.

An act was passed, directing a subscription to be made to the

capital stock of a certain Rail Road, to a given amount, with a proviso, that if the Company should not locate the road in the manner provided for in the act, then and in that case, the Company should forfeit to the State a given sum, for the use of the County of W.; it was held that the sum to be forfeited for a non-compliance with the act was a penalty, and not a part of the contract consideration by the assent of the company to the supplemental charter, containing the proviso, and that the proviso, being a penalty, might be repealed, and the penalty remitted, as well after as before suit brought to recover it, and that no right was vested in the County of W., or any of its inhabitants, that could be enforced in a court of justice; and the court gave full effect to a subsequent statute, which repealed so much of the law as required the Rail Road Company to construct the road by the route therein prescribed, and remitted and released the penalty, and directed a suit discontinued brought to recover it. *State of Maryland v. Baltimore and Ohio Rail Road Co.*, 3 Howard, 534; *State v. Same Company*, 12 Gill and Johnson, 399.

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Constitution-
al Law.

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The act of the 27th of March 1848, of the New-York Legislature, requiring Rail Road Companies to erect fences on the lines of their roads, and to erect and maintain cattle guards at their crossings, and though the provisions of that act were extended to Rail Roads then existing, yet it was in that respect held constitutional. *Suydam v. Moore*, 8 Barbour, 358.

The same principle was adopted by the Supreme Court of Vermont in *Nelson v. The Vermont and Canada Rail Road Company*. 3d Vol. *Livingston's Law Magazine*, p. 15; and to appear in 26 *Vermont*.

But it is held that a Statute, to define the liability of Rail Road Companies, as to stock killed on their roads, must be prospective in its operation. *Gristman v. Central Rail Road Company*, 9 *Kelly (Georgia)*, 173. Under that section of the revised statutes of New York, which gave the Legislature power in their discretion, to alter, repeal or suspend any charter thereafter to be granted, it was held the Legislature had such power, though there was no clause in the charter itself reserving such power to the Legislature, and this without the consent of the Corporation. *Suydam v. Moore* 8 *Barbour*, 358. The prohibition in the Consti-

8 & 9 VICT. c. 16. tution of New York adopted in 1841, against the sale of salt land
 Sect. 2 was construed not to extend to the taking of lands for highways
 Constitution- or Rail Roads. *Parmelee v. Oswego and Syracuse Rail Road*
 al Law. *Company*, 7 *Barbour*, 599.

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The 4th section of the 8th article of the Constitution of Ohio, provided that "the credit of the State should not in any manner be given or loaned to, or in aid of any individual, association or corporation whatever, nor should the State ever thereafter become a joint owner or stockholder in any company or association, in the State or elsewhere, formed for any purpose whatever." And it was held, that under this provision, the Legislature could not authorize a majority of citizens in a county, to vote subscriptions of stock to a Rail Road Company, which should bind the property of the minority (Per. Spaulding J.) *Griffith v. Commissioners of Crawford County*, 20 *Ohio*, 609.

Where, by Statute, a Rail Road Company were authorized to issue bonds payable to their creditors, and a special fund was designated in the act for the payment of interest, the principal being irredeemable for thirty years, and the same statute provided that the claims of one A., should be referred to the arbitration of B., and that any amount found due him should be paid in like manner as the claims of other creditors "and not otherwise;" and by a subsequent statute, the claim of A., was submitted to other arbitrators, to proceed *de novo*, and the Company were directed to issue the bonds mentioned in the first act, to such additional amount as would be sufficient to pay the second award, and the creditors named in the first act did not assent to the second act, it was held that until the creditors whose claims existed at the time of the first act were satisfied, the Company could not issue their bonds to A., payable out of the same fund except for such amount as should be determined by the award of B. *McCullough v. A. & E. Rail Road Company*, 4 *Gill*, 58.

If a Legislature have, by a general law, reserved the right to amend, alter or repeal at pleasure, all acts of incorporation which should be subsequently passed and a charter is accepted under such a provision in the law, the Legislature may make alterations or amendments to the charter as they shall see fit, and they are also

bound by subsequent general acts. *Roxbury v. Boston and Providence Rail Road Company*, 6 Cushing, 424. 8 & 9 Vict. c. 16. Sect. 1.

The injury, which may be done to the owners by destroying all communications between parts of their land lying on opposite sides of the track, is to be included in the estimate of damages. *Mason v. Kennebeck and Portland Rail Road Company*, 31 Maine, 215.

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An action to recover damages for destroying such communication, by taking land for a Rail Road, or by the erection thereon of an embankment proceeding not upon the ground that the land had been illegally taken, but upon the ground that the power conferred had been transcended or abused, affords no basis for a decision of the *constitutionality* of that power. *Ib.*

A company after incorporation becomes what is called a corporation aggregate, and it acquires many powers, rights, capacities, &c.; such, 1st. To have perpetual succession; 2nd. To sue or be sued, implead or be impleaded, grant or receive by its corporate name, and do all other acts as natural persons may; 3d. To purchase lands and hold them for the benefit of themselves and their successors; 4th. To have a common seal (Co. Litt. 30 b,) for a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse—it therefore acts and speaks only by its common seal; 5th. To make by-laws or private statutes for the better government of the corporation, which are binding upon themselves, unless contrary to the laws of the land, and then they are void. These five powers are inseparably incident to every corporation aggregate. (1 Bl. Com. 475, 476; Kyd on Corp. Intr. 13. See Grant on Corp. 76.) The power of making by-laws for railways is subject to many general regulations by statutes. See index *By-laws*.

By the common law, it was an incident to every corporation to have a capacity to purchase lands for themselves and their successors. (Litt. R. 49, 112, 114; 10 Rep. 30 b; 1 Bl. Com. 478.) But since the statutes of mortmain, although corporations may take lands, they cannot retain them without licence in mortmain. (Shelford on Mortmain and Char-

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Rule, that
corporation
cannot bind
their prop-
erty except
under com-
mon seal.

ities, 8, 27.) The several railway acts only authorize the companies to purchase a certain quantity of lands, and those for the purpose of the undertaking. There is usually a provision that the quantity of land to be taken by the company for extraordinary purposes shall not exceed the prescribed number of acres, and the time for exercising the powers of compulsory purchase of lands is limited. Railway companies, unless authorized by act of parliament, have no *power to lend money on lands by way of mortgage. (*Ib.* 10, n. 27. See Grant on Corp. pp. 98—106.)

The general rule is, that a corporation can neither take nor grant but by its proper name of incorporation; though every minute variation in the name will not avoid a grant. (*Kyd on Corp.* 234, 237; *Mayor of Carlisle v. Blamire*, 8 East, 487, 492; *Com. Dig.* Capacity, B 5; *Croydon Hospital v. Farley*, 2 Marsh, 174; 6 Taunt. 467; *Shelford on Mortmain and Charities*, 516, n. (u), 676. In dealing with incorporated companies, it is important to bear in mind the general rule that a corporation can neither dispose of nor bind their corporate property, except by deed under their common seal. (*Bro. Corp.* 34, 50, 51; 1 P. Wms 656; 3 Atk. 475; *Bac. Abr.* Corporations (E); 3 *Com. Dig.* Franchise, F. 12, 13.) An exception to this rule has arisen in modern times, since corporations have been established by acts of parliament for the purpose of carrying on trading speculations; and where the nature of their constitution has been such as to render the drawing of bills, or the constant making of any particular sort of contracts necessary for the purposes of the corporation, then the courts have implied in those who are, according to the provisions of the act of parliament, carrying on the corporation concerns, an authority to do those acts without which the corporation could not subsist. See 6 Mee. & W. 821; 6 Ad. & E. 829, 846.)

The general rule of law is, that a corporation contracts under its common seal: as a general rule, it is only in that way that a corporation can express its will or do any act.

That general rule, however, has from the earliest traceable periods been subject to exceptions, the decisions as to which furnish the principle on which they have been established, and are instances illustrating its application, but are not to be taken as so prescribing in terms the exact limit that a mere circumstantial difference is to exclude from the exception. This principle appears to be convenience, amounting almost to necessity. Wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed: hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions; on the same principle stands the power of accepting bills of exchange, and issuing promissory notes, by companies incorporated for the purpose of trade, with the rights and liabilities consequent thereon. (*Church v. The Imperial Gas Light and Coke Co.*, 6 Ad. & E. 681; 3 Nev. & P. 35.) To every word of the above the Court of Exchequer entirely subscribed, in the case of the *Mayor of Ludlow v. Charlton*, 6 Mee. & W. 822.

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In this case it was observed by *Rolfe*, B., that if the legislature in creating a body corporate invest any member of it, either expressly or impliedly, with authority to bind the whole body by his mere signature or otherwise, then *undoubtedly the adding a seal would be matter purely of form, and not of substance. In other cases the seal is the only authentic evidence of what the corporation has done or agreed to do. The resolution of a meeting, however numerous attended, is after all, not the act of the whole body. (*Mayor of Ludlow v. Charleton*, 6 Mees. & W. 823.) (*80)

If work be done for a corporation for purposes connected with the corporation, under a verbal order, and accepted and adopted by them, they cannot in an action to recover the price object that no order was given under seal. (*Sanders v. St. Neots Union*, 8 Q. B. 816.)

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After a railway company was incorporated by act of parliament, an accident occurred to a passenger on the line in consequence of the negligence of one of the servants of the company:—it was held, that neither the engine driver, the railway guard at the station where this took place, nor the superintendent of the traffic department, had implied authority to make contracts obligatory on the company with medical men called in to assist the injured person. (*Gox v. Midland Counties Railway Company*, 3 Exch. 268; 13 Jur. 65; 18 L. J. Exch. 65; 5 Railw. C., 583.)

But such an authority might be inferred from the conduct of the directors of the company on former occasions in recognizing similar contracts made by their officers; or, perhaps, from evidence that such powers were usually exercised by similar agents of similar companies. (*Ib.*)

An objection to a bill by an incorporated railway company for specific performance of a contract for the purchase of land entered into by their agent, that it did not appear that the agent was authorized under the corporate seal, and therefore that there was no mutuality, was overruled, on the ground that the company had, before the bill was filed, not only acted on the contract by entering into possession of the land, but actually made a railroad over it. (*London and Birmingham Railw. Co., v. Winter*, 1 Cr. & Ph. 57.)

If a contract is executed on the part of a corporation, and the parties who contracted with the corporation have received the benefit of the consideration money from the corporation, in that case the other parties are bound by the contract, though not under the corporate seal, and are liable to be sued thereon by the corporation. (*Fishmongers' Co. v. Robertson*, 6 Scott, N. R. 56, see p. 105.)

Though the affixing of the common seal to the deed of conveyance of a corporation be sufficient to pass the estate, without a formal delivery, if done with that intent, yet it has no such effect if the order for affixing the seal be accompanied with a direction to their clerk to retain the conveyance

in his hands till accounts have been adjusted with the purchaser. (*Derby Canal Co. v. Wilmot*, 9 East, 360. See *Doe* 8 & 9 Vict. c. 16
d. *Bank of England v. Chambers*, 4 Ad. & E. 412; 6 Nev. Sect. 1.
& M. 539.)

A corporation aggregate may sue and be sued in *indebitatus assumpsit* (*Beverley v. Lincoln Gas Light Co.* 6 Ad. & E. 829; *Arnold v. Mayor of Poole*, 4 M. & Gr. 896,) *on [*81]
an executed parol contract, e. g. for goods sold and delivered.

Parke, B. said the former case may be supported on the ground that the parliamentary charter of the company contemplated the purchase of gas without any contract under seal. (7 Exch. 417.)

Although leave or licence to use a road has not been given under the seal of a company, yet if there has been, if not in form, at least in substance, a consent by the proprietors of the soil, the Court of Chancery will not interfere by injunction at the suit of one of several persons entitled to an easement to restrain the effect of a licence or permission of the owners of the soil. (*Semple v. London and Birmingham Railw. Co.*, 1 Railw. C. 480, see p. 492; 2 Jur. 296, 560; 9 Sim. 209.)

A railway company can only bind themselves by their common seal, or in the mode prescribed by the statute of incorporation.

An incorporated railway company agreed by parol to take certain premises for a year; they occupied, and at the end of the year continued to occupy another year, at the expiration of which period they removed their goods without any previous notice to quit, but paid rent up to the end of the following quarter: it was held, that they were not liable in action for use and occupation for the remaining three quarters of a year, since they did not occupy during that period, and that no tenancy could be inferred from the payment of rent, inasmuch as they could not contract except under seal.

Finley v. Bristol and Exeter Railw. Co., 7 Exch. 409.

An entry in the books of a corporation of an agreement Entry in cor-
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 corporation
 books.
 Sec. 2.

made by them does not bind them, although it is signed by a majority of the members. (*Carter v. Dean and Chapter of Ely*, 7 Sim. 211.) A corporation aggregate was held not to be bound by the resolutions of its members, entered in the books of the corporation, but not under the common seal, by which they agreed to pay to an individual 500*l.* in consideration of his making certain alterations in a house which was his property. (*Corporation of Ludlow v. Charleton*, 6 Mee. & W. 815; 4 Jur. 657.)

[*82] The defendants were a corporation established by act of parliament, one section of which enacted that the court of directors should have power to use the common seal on behalf of the company, and all contracts relating to the affairs of the company, which should be signed by any three of the directors in pursuance of a resolution of a court of directors should be binding on the company and all parties. The following section enacted that the directors should have full power to employ the workmen and regulate the traffic on the line, and the rates and tolls, and appoint and displace the bankers and solicitors of the company, and all such managers, officers, agents, clerks, workmen, and servants as they should think proper. By a resolution made at a court of directors and signed by the chairman, the plaintiff was *appointed agent for the company, to negotiate with the London and North Western Railway Company or any other railway company, for the lease of the line of the company. It was held, that the plaintiff was not entitled to recover for his services in respect of such negotiation, the resolution not having been sealed with the corporate seal or signed by three directors. (*Cope v. Thames Haven Dock and Railw. Co.*, 13 L. J., Exch. 345; 3 Exch. 841; 6 Railw. C. 8 s.)

Where a private act of parliament constituting a railway company provides that the directors may "appoint or displace any of the officers of the company," the appointment of an attorney to the company need not be under seal. (*Reg. v. Cumberland (Justices)*, 5 Dowl. & L. 431; Law J. 1848, Q. B. 102; 6 Railw. C. 73.)

By a railway incorporation act the directors of the company were authorized to use the common seal, and all contracts in writing relating to the affairs of the company which should be signed by any three of the directors were to bind the company. The company after having been established for some time resolved to change the system of locomotion, and by their secretary entered into an agreement, *not under seal*, with a contractor that he should execute works. He accordingly commenced the works, but before they were complete he was dismissed by the company. It was held, that he could not recover the value of the work done, because there was no contract under seal, nor signed by three directors, nor entered into under a resolution of the directors authorizing the work in question. (*Diggle v. London and Blackwall Railw. Co.*, 5 Railw. Ca. 591; 5 Exch. 442; see *Homersham v. Wolverhampton Waterworks Co.*, 6 Railw. C. 790, *post*, s. 97, n.)

[82]

It is questionable whether a corporation can borrow money except under the corporate seal. (*Wilmot v. Corporation of Coventry*, 1 Y. & Coll. 518.) Sir J. Leach, however, was of opinion that if a regular corporation resolution passed for granting an interest in a part of the incorporation property, and upon the faith of that resolution expenditure had been incurred, that both principle and authority would be found for compelling the corporation to make a legal grant in pursuance of that resolution. (*Marshall v. Corporation of Queenborough*, 1 Sim. & St. 520; see 1 P. Wms. 656; 3 Atk. 476, 478.) (1)

(1) A Railway Company associating, allying and connecting itself with another does not thereby become equitably amalgamated with it. Of amalgamation of corporations.

An agreement to amalgamate, as from a time past may possibly in equity, amount to amalgamation, but an agreement to do so at a future period will not, until that period arrives. *Shrewsbury &c., Railway Company v. The Stour Valley Railway Company*, 21 Eng. Law & Equity Rep. 629.

III. The following words and expressions both in this and Interpretation

- 8 & 9 VICT. c. 16. the special act shall have the several meanings hereby assigned to them, unless there be some thing in the subject or the context repugnant to such construction ; (that is to say.)
- tions in this and the special act : Words importing the singular number only shall include the plural number ; and words importing the plural number only shall include the singular number :
- Number.
- [*83]
- "Gender." *Words importing the masculine gender only shall include females :
- "Lands." The word "lands" shall extend to messuages, lands, tenements, and hereditaments of any tenure ;
- "Lease." The word "lease" shall include an agreement for a lease :
- "Month." The word "month" shall mean calendar month :
- "Superior courts." The expression "superior courts" shall mean her majesty's superior courts of record at Westminster or Dublin, as the case may require :
- "Oath." The word "oath" shall include affirmation in the case of Quakers, or other declaration lawfully substituted for an oath in the case of any other persons exempted by law from the necessity of taking an oath (*d*) :
- "County." The word "county" shall include any riding or other like division of a county, and shall also include county of a city or county of a town (*e*) :
- "Justice." The word "justice" shall mean justice of the peace acting for the county, city, borough, liberty, cinque port, or other place where the matter requiring the cognizance of any such justice shall arise, and who shall not be interested in the matter ; and where any matter shall be authorized or required to be done by two justices, the expression "two justices" shall be understood to mean two justices assembled and acting together in petty sessions (*f*) :
- "Two Justices."
- "The Company." The expression "the company" shall mean the company constituted by the special act :
- "Directors." The expression "the directors" shall mean the directors of the company, and shall include all persons having the direction of the undertaking, whether under the name of directors, managers, committee of management, or under any other name :
- "Shareholder." The word "shareholder" shall mean shareholder, proprietor, or member of the company ; and in referring to any

such shareholder, expressions properly applicable to person shall be held to apply to a corporation; and
 The expression "the secretary" shall mean the secretary of the company, and shall include the word "clerk" (*g*).
 8 & 9 Vict. c. 16.
 Sect. 3.
 "Secretary."

(*d*) By 9 Geo. 4, c. 35, every Quaker or Moravian required to give evidence in any case whatsoever, criminal or civil, shall instead of an oath in the usual form be permitted to make a solemn affirmation or declaration in the following: viz., "I *A. B.* do solemnly, sincerely, and truly declare and affirm," which shall be of the same *force and effect in all courts of justice and other places where by law an oath is required, as if such Quaker or Moravian had taken an oath in the usual form. By 3 & 4 Will. 4, c. 49, their affirmation is to be of the same force and effect as an oath in the usual form, in all cases where an oath is by law required. By 3 & 4 Will. 4, c. 82, a similar provision is made in favor of a religious sect called Separatists. By 1 & 2 Vict. c. 77, any person who has been a Quaker or Moravian, and who entertains conscientious objections to the taking of an oath, may be allowed to make solemn affirmation and declaration in lieu of taking an oath, as fully as he might be allowed to do in case he still remain a member of either of these denominations of Christians, and this affirmation or declaration is made of the same force and effect as if an oath had been taken in the usual form. See 5 & 6 Will. 4, c. 62, as to declarations in lieu of oaths and affirmations.
 [*84]

(*e*) These terms are to receive the same construction in 8 & 9 Vict. c. 18, s. 3; 8 & 9 Vict. c. 20, s. 3.

(*f*) With respect to the magistrates of the metropolitan police courts, it is enacted by the 2 & 3 Vict. c. 71, s. 14, that it shall be lawful for him "to do alone any act" which "by any law now in force, or by any law not containing an express enactment to the contrary hereafter to be made, is or shall be directed to be done by more than one justice."

(*g*) As to the word dividend see sect. 121 of this act.

IV. That in citing this act in other acts of parliament and in legal instruments it shall be sufficient to use the expres-
 Short title of the act.

8 & 9 VICT. c. 16. sion "The Companies Clauses Consolidation Act, 1845" (h).

Sect. 3

(h) See 8 & 9 Vict. c. 18, s. 4, n.

Partial Incorporation with other Acts.

Form in
which por-
tions of this
act may be
incorporated
with other
acts.

V. And whereas it may be convenient in some cases to incorporate with acts of parliament hereafter to be passed some portion only of the provisions of this act; be it therefore enacted, that for the purpose of making any such incorporation it shall be sufficient in any such act to enact that the clauses and provisions of this act with respect to the matter so proposed to be incorporated (describing such matter as it is described in this act in the words introductory to the enactment with respect to such matter), shall be incorporated with such act; and thereupon all the clauses and provisions of this act with respect to the matter so incorporated shall, save so far as they shall be expressly varied or excepted by such act, form part of such act, and such act shall be construed as if the substance of such clauses and provisions were set forth therein with reference to the matter to which such act shall relate.

[*85]

**Distribution of Capital.*

Capital to
be divided
into shares.

And with respect to the distribution of the capital of the company into shares be it enacted as follows :

VI. The capital of the company shall be divided into shares of the prescribed number and amount; and such shares shall be numbered in arithmetical progression, beginning with number one; and every such share shall be distinguished by its appropriate number (i)

(i) The special act provides that the number of shares into which the capital shall be divided shall be — shares, and that the amount of each share shall be £—. The whole of the capital must be subscribed before the compulsory powers of taking lands for the undertaking can be put in force; 8 & 9 Vict. c. 18, s. 16. The statute establishing a particular company provided that the whole of the said sum of 100,000*l.* shall be subscribed before any of the powers and pro-

visions given by the act shall be put in force. The company made a call on the shares before the subscriptions were complete, and commenced an action for the calls after they were so : it was held, that such action was not maintainable ; the completion of the subscription list being necessary to enable the company to make the call, as well as to bring the action. (*Norwich and Lavestoffe Navigation Co. v. Theobald*, 1 M. & M. 151.)

The 22nd section of the Waterford, Wexford, &c., Railway Act enacts, that when 1,500,000*l.* shall have been subscribed, it shall be lawful for the company to put in force all the powers of the act, and of the acts therein recited, as regards that portion of the said railway, situate, &c. : it was held, that the raising of this sum was not a condition precedent to the power of the company to make calls, but only to their exercising the compulsory powers of taking lands, &c. (*Waterford, &c. Railway Company v. Dalbiac*, 20 L. J., Exch., 227 ; 6 Railw. C. 753 ; Exch. 443.)

VII. All shares in the undertaking shall be personal estate, and transmissible as such, and shall not be of the nature of real estate (1). (*k*.)

Shares to be personal estate.

(1) Stock in the Lexington and Ohio Rail Road Company is real estate. *Price v. Price*, 6 Dana, 107.

(*k*) Shares in incorporated railway and canal companies are not within the stat. 9 Geo. 2, c. 36, which declares that all gifts, &c., of lands, tenements or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting any lands, tenements or hereditaments made otherwise than prescribed by that act, shall be void. (*Ashton v. Lord Langdale*, 15 Jur. 868 ; 20 Law J. Ch. 234.) (Debentures of such companies being nothing more than promises to pay money, which do not convey or charge the undertaking or any of its tolls, are also not within the act. (*Ib.* ; *Myers v. Perigal*, 16 Sim. 533.) Nor is railway scrip within the *act. (*Ashton v. Lord Laydale*, sup.) Mortgages [*86]

Shares when not within Mortmain Act.

8 & 9 Vict. of the railway company's undertaking, tolls and rates are
 c. 16. within the act. (*Ib.*)
 Sect. 7.

[86]

Shares in gas light and in a dock company, which possessed real estate for the purposes of their undertaking, have been held not to be within act 9 Geo. 2, c. 36. (*Sparling v. Parker*, 9 Beav. 450; *Thompson v. Thompson*, 1 Coll. C. C. 381; *Hilton v. Geraud*, 1 De G. & S. 183.)

Dock and canal shares and bonds secured by an assignment of the rates, have been held not to be an interest within the act. (*Walker v. Milne*, 11 Beav. 507; *Tomlinson v. Tomlinson*, 9 Beav. 459, *contra.*)

Lord *Langdale*, M. R., observed, a shareholder in one of these companies, whether incorporated or not, has a right to receive the dividends payable on his share, i. e. a right to his just proportion of the profits arising from the employment of the joint stock consisting partly of land, and he has also a right to assign his share for value; but whilst he continues to hold his shares he has no interest or separate right to the land or any part of it. (*Sparling v. Parker*, 9 Beav. 457-8.)

Shares in a joint stock bank, the property in which consisted in part of freehold and copyhold estates and mortgages for terms of years were held not to be within the act. (*Myers v. Perigal*, 11 C. B. 90; 16 Sim. 533, *contra.*)

Parol con-
 tract.

By a railway act it is declared that the shares in the undertaking, or the joint stock and fund of the company, should to all intents and purposes, be deemed personal estate, and be transmissible as such, and should not be of the nature of real property: it was held, that the shares of individual proprietors were not an interest in land, and therefore might be sold by a verbal contract; and it seems this would have been so even if the act had contained no such clause. (*Bradley v. Holdsworth*, 3 Mee. & W. 422)

Contract for
 sale of op-
 tion in rail-
 way shares.

The defendant and P. agreed for the sale by P. to the defendant of the "put or call" of fifty foreign railway shares, at a certain price per share premium, at any time on or be-

fore the 18th of February, 1844. Before that day, the defendant agreed to resell the option to the plaintiff, and to guarantee the performance of the agreement by P. On the 16th February, the plaintiff *called* the shares (i. e. required the delivery of them pursuant to the agreement,) but it was at the same time verbally agreed between him and the defendant and P. that they should be delivered by P. to the plaintiff not on the 18th February but on the 2d March, at Paris. It was held, that this was not an agreement by the defendant to be answerable for the default of P., but an original promise by the defendant for the delivery of the shares by P., for which a note in writing was not required by the Statute of Frauds, which applies only to promises made to the persons to whom another is already or is to become answerable. It must be a promise to be answerable for the debt of, or a default in some duty by, that other person *towards the promisee*. (*Hargreaves v. Parsons*, 13 M. & W. 561.)

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*VIII. Every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, and whose name shall have been entered on the register of shareholders hereinafter mentioned, shall be deemed a shareholder of the company (l). [*87] Shareholders.

(l) The word "subscribe" may either mean actual payment of a sum of money to a particular purpose, or apply to a man who puts down his name to a contract by which he binds himself to contribute to the extent of the number of shares for which he puts down his name. (*The Thames Tunnel Co. v. Sheldon*, 6 B. & C. 341, see p. 348; 9 D. & R., 278.) Meaning of the word "subscribe."

The language of the act incorporating the subscribers may vary in different acts, but this enactment usually runs thus, that certain persons who are named in the act, "and all other persons and corporations *who have already subscribed or shall hereafter subscribe* to the undertaking by this act authorized, and their executors, administrators, successors and assigns respectively, shall be united into a com-

8 & 9 VICT.
c. 16.
Sect. 8.

pany for the purpose" of making the railway in question. Such words include all who have subscribed, and make them part of the corporate body.

The word "subscriber," notwithstanding the generality of the words of the statute (see *Stowel v. Lord Zouche*, Plowd. 364), has been considered to apply to persons, who are capable of contracting, as it cannot be inferred to be the intention of the legislature to make liable those persons who were incapable of contracting, such as infants, idiots or married women. (*Newry and Enniskillen Railw. Co. v. Combe*, 5 Railw. C., 633; see pp. 641, 643; *Leeds and Thirsk Railw. Co. v. Fearnley*, 5 Railw. C. 644.)

In a subsequent case the Court of Exchequer dissented from the opinion of the Court of Queen's Bench, as reported in the case of *Cork and Brandon Railw. Co. v. Cazenove* 11 Jur. 802, and 10 Q. B. 935, if it goes to the full extent that all shareholders, including infants, are by the operation of the railway acts made absolutely liable to pay calls, and repeated that they considered that there are implied exceptions in favor of infants and lunatics in statutes containing general words, though that depends of course on the intent of the legislature in each case. (6 Railw. C. 624; see Wilmot's notes, 194; see note to 26th sect. as to liability of infants to calls.)

Registry of
sharehold-
ers.

[*88]

IX. The company shall keep a book, to be called the "Register of Shareholders;" and in such book shall be fairly and distinctly entered, from time to time, the names of the several corporations, and the names and additions of the several persons entitled to shares in the company, together with the number of *shares to which such shareholders shall be respectively entitled, distinguishing each share by its number, and the amount of the subscriptions paid on such shares, and the surnames or corporate names of the said shareholders shall be placed in alphabetical order; and such book shall be authenticated by the common seal of the company being affixed thereto; and such authentication shall take place at the first ordinary meeting, or at the next subsequent meeting of the company, and so from time to time at each ordinary meeting of the company (n).

(n) The court will not grant a mandamus commanding a railway company to take the seal off the register of shareholders, on a suggestion that it was fixed without authority and contrary to the provisions of this act. (*Ex parte Nash*, 15 Q. B. 92; 14 Jur. 574; 19 Law J., Q. B. 296.)

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Registration
of share-
holders.

Under the 38th section of this act, the register of shareholders having thereon the seal of the company, is admissible in evidence without proof that the seal was duly affixed to the document at an ordinary meeting of the company, in pursuance of the provisions of the 9th section of this act. (*London and North Western Railway Company v. M'Michael*, 5 Exch. 855. See *Inglis v. Great Northern Railway Co.*, 16 Jur. 895.)

[88]

The Companies Clauses Consolidation Act for Scotland, 8 & 9 Vict. c. 17, s. 9, required, in the same terms as the English statute of that name, a book to be kept, containing, in alphabetical order, the names of the shareholders, with the number of the shares to which such shareholders shall be respectively entitled, distinguishing each share by its number, and the amount of the subscriptions paid on such shares. The 29th section of the statute makes such book *prima facie* evidence of a person being a shareholder, and of the number and amount of his shares. It was held, first, that as this was an exceptional privilege in favor of the company, the provisions of the statute with respect to the mode of keeping the book must be strictly complied with; and, secondly, that an entry in the book, describing A. as possessed of a certain number of shares, numbered from one given number to another given number, and stating a gross amount as paid upon these shares, was a sufficient compliance with those provisions, so as to render the book admissible as evidence. (*Bain v. Whitehaven and Furness Junction Railway Co.*, 3 H. L. Ca. 1.)

The statute requires that a book, to be called "The Register of Shareholders," shall be kept. The book actually kept was marked "Register of Proprietors." It was held

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 c. 16. given in evidence. (*Ib.*)
 Sect. 9.

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A railway company, under this act, cannot maintain an action for a call against a transferee of scrip certificates of shares in the company (or probably even against an original *subscriber,) unless at the time when the call was made, his name was entered on the sealed register of shareholders, which is required by this section ; and therefore, where in an action for a call it appeared that the defendant had purchased the scrip certificates of the shares, and before the call was made sent them into the company with a claim to be registered in their books as a shareholder, and that his name was accordingly entered in a draft register of shares, and a receipt for the scrip sent to his agent, but that his name was not entered on the sealed register until after the call was made : it was held, that the plaintiffs could not recover. (*Newry and Enniskillen Railway Company v. Edmands*, 12 Jur. 101 ; 5 Railw. C. 275.)

The company, before they require a party to pay calls, are bound to give him a title by putting his name on their sealed register. In an action for calls, where the entry in the sealed register was *Browrigg and others, trustees*, not mentioning the name of one of the defendants, but in the alphabetical register the names of all the defendants were entered : it was held that the sealed register was no evidence against the defendant whose name did not appear therein. (*Birkenhead, &c. Junction Railway Company v. Browrigg and others*, 6 Railw. C. 47 ; 4 Exch. 426.)

By an agreement dated July, 1847, A., for the considerations thereafter mentioned, agreed with an incorporated railway company to take certain shares, and to pay four pounds per share in respect thereof, on or before the 15th August, 1847, and that so soon as fifteen pounds per share should have been paid on the said shares, and the said company were in a position legally to do so, they should deliver to A. mortgage debentures of the railway company, bearing interest for the sum of £24,675, being at

the rate of five pounds per share. This agreement was duly confirmed by the company, and A.'s name was in consequence of it, and without any other authority, entered in the register of shareholders, and he had notice of such entry and register on each authority, and confirmed and ratified the same, and assented thereto. A. was elected and acted as a director of the company after the making the agreement, and his name remained on the register as the person entitled to these shares, until a call was, in December, 1847, duly made upon them, of which he had due notice. In an action against A. to recover the call, the register of shareholders duly authenticated, and containing an entry of A.'s name as a shareholder was produced at the trial. On a special verdict, finding these facts, it was held that A. was liable, as a registered shareholder, to the call. (*West Cornwall Railw. Co. v. Mowatt*, 19 L. J. Q. B. 478; 15 Q. B. 421.)

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c. 16.
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It was held also assuming the stipulation as to the mortgage debentures to be illegal, that it would be no defence to an action brought, not upon an executory contract, but upon the statutable liability to pay calls. (*Ib.*)

But that the stipulation being merely that the company would deliver the mortgage debentures when they were in a position legally to do so, was not illegal and would not vitiate the contract on the part of A. (*Ib.*)

[*90]

It was held also, that an action for the call made in December, 1847, might be maintained without proof that A. had paid the four pounds per share. (*Ib.*)

The purchaser of scrip shares in a provisionally registered railway company neglected to send in his scrip to be registered, after the act of parliament incorporating the company had been obtained. The company, in consequence, registered the original allottee of the shares as the owner liable to the company for calls, and, in compliance with the provisions of the railway act, sent him the sealed certificate of ownership. The allottee being unable to find the scrip holder, sold the shares in the market. It was held in a suit afterwards brought by the scrip holder, that the allottee was a trustee of

8 & 9 VICT. the proceeds of the shares for the plaintiff, and liable as such
 c. 16. to account. (*Beckitt v. Bilbrough*, 14 Jur. 238; 19 L. J.
 Sect. 9. Chanc. 522; 8 Hare, 188.)

[90] A shareholder is presumed to continue in that character till a transfer of his shares is duly registered. (*Corden v. Universal Gas-Light Co.*, 6 D. & L. 379.)

As to the
 transfer of
 scrip certi-
 ficates.

The directors of projected railway companies obtain the signatures of the subscribers to the parliamentary deed (see form in appendix), by which the latter engaged to pay up the subscribed capital in compliance with the standing orders of the two Houses of Parliament. On the execution of this deed and another deed called the subscribers' agreement, and after payment of the deposits, the directors issue scrip certificates, which are extensively sold, and pass into the hands of persons who at the time of the act passing may be perfect strangers to the original parliamentary deed. Shortly after the special act has received the royal assent, a notice is usually issued requiring all persons holding scrip certificates in the company to transmit them to the secretary before a day named in such notice with their names, professions, and residences distinctly written, in order that the same may be correctly entered in the register of the company in accordance with the provisions of the Companies Clauses Consolidation Act. There can be little doubt that it is the intention of the legislature in passing railway acts, that the parties who have signed the parliamentary deed should be the parties who are registered. As a pledge to the subscribers that there will be an available fund for the works, the legislature require an estimate of the expense to be made and signed by the person making the same; and that a subscription be entered into under a contract to three-fourths of the amount of the estimate (*Standing Orders*, 1852, H. C. 52; H. L. 184 s. 1); and that in all bills presented to the House for carrying on any work by means of a company, provision be made for compelling persons who have subscribed any money towards carrying any such work into execution, to make pay-

ment of the sums severally subscribed by them. (H. C. 113 ; see 8 & 9 Vict. c. 16, ss. 21—25.)

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*One of the several persons who have subscribed an agreement *inter se*, to promote a joint undertaking or common purpose, cannot withdraw his name and discharge himself from the engagement without the consent of the rest of the subscribers; and if an act of parliament have been passed for effectuating the purpose of the undertaking, by which certain obligations are created, such original subscriber is not exonerated from the liabilities imposed by the act by having during the progress of the bill renounced before the committee all further connection with the undertaking, and desired that his name might be in consequence omitted in the act; nor can the circumstance of his name so being omitted have the effect of disengaging him from liability to an action for calls as a proprietor of shares. (*Kidwelly Canal Co. v. Raby*, 2 Price, 93.)

Under the deeds the original subscribers are the only persons liable until the act is obtained, and the only persons who have a legal claim to be registered. After the act is obtained, the assignments of shares are to be made conformably to the provisions of the Companies Clauses Consolidation Act. Should the holders of scrip certificates on the passing of the act not be adopted by the directors, the former will have no remedy against the original subscribers, even on a special contract, if the transfer is illegal. It appears certain that the directors can place the original subscribers to the parliamentary deed, although they have parted with their scrip certificates, on the register of shareholders, with the view of proceeding to get further capital to carry on the work. Until the directors choose to accept the scripholders by registering them, the original subscribers remain liable for any calls upon their shares until they have been assigned conformably to the provisions of the Companies Clauses Consolidation Act. It is necessary the original subscribers should be responsible to the company, for neither the company nor the original subscribers have any means of compel-

8 & 9 VICT. c. 16. ling the persons to whom, before the passing of the act of
Sect. 9. parliament, shares have been transferred, to come in after the passing of the act and to register the same. The practice however, of selling the scrip certificates has been so general and has been so much encouraged by directors, who themselves frequently do it, that it would be considered a harsh step to carry out the parliamentary deed against subscribers who have parted with their shares and given up their interest in the concern. Parties may become shareholders—1. By signing the parliamentary contract or the subscriber's agreement; 2. By taking shares issued by the company after the passing of the act; 3. By purchase from a registered proprietor; 4. By the purchase of scrip certificates and being registered as proprietors.

On the provisional registration of a company subscription lists may be opened, shares allotted, and certain deposits received, 7 & 8 Vict. c. 110, s. 23.

Sale of rail-
way scrip
certificates.
[*92]

The 26th sect. of the stat. 7 & 8 Vict. c. 110, which prohibits the sale of shares or scrip of a company only provisionally *registered, does not apply to railway companies, which must obtain the authority of parliament. *Young v. Smith*, 15 Mees. & W. 121; 4 Railw. C. 135; Law J. 1846, Exch. 81; *Lauton v. Hickman*. 9 Q. B. 563; 4 Railw. C. 336; *Bousfield v. Wilson*, 16 Mees. & W. 183; 4 Railw. C. 687; *Beckitt v. Bilbrough*, 8 Hare, 195.)

All that the sale of the scrip gives is an equitable right to the purchaser to have his name entered on the register as a shareholder. If the purchaser gets his name entered on the register then he is the shareholder, and the liability of the original subscriber ceases, but until he does so, the responsibility of the original subscriber continues. (*Midland Great Western Railway Co. v. Gordon*, Law J. 1847, Exch. 166; 5 Railw. C. 76. See *London Grand Junction Railway Co. v. Freeman*, 2 Man. & Gr. 106; 2 Scott, N. R. 705.)

An allottee of scrip in a railway company who has subscribed the subscribers' agreement, and sold his scrip in the

market before the act of parliament is obtained and whose name has been entered on the register of shareholders without his consent, is liable for calls until the name of the purchaser is inserted in the register of shareholders. (*Midland Great Western Railw. Co. v. Gordon*, Law J. 1847, Exch. 166; 5 Railw. C. 76.)

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[92]

The sale of railway scrip is nothing more than an agreement for the transfer of the interest which the party may thereafter possess in the capital of the company, and such interest does not come within the description of "goods, or wares, or merchandize," within the exemption in the stamp act, 55 Geo. 3, c. 184, sched. part 3, tit. Agreement. (*Knight v. Barber*, 16 Mees. & W. 66; 4 Railw. C. 674.)

Therefore a contract in writing for the sale of railway scrip requires an agreement stamp although signed by the purchaser only. (*Ib.* See 13 & 14 Vict. c. 97, Sched. tit. Agreement.)

In a case where it was contended that no others than the original subscribers, or those to whom they might have made over their shares after the passing of the act, by the means thereby prescribed, ought to have been registered: it was held, that there is no principle of law preventing a railway company when they come to make up the register book, from treating the then holders of scrip certificates applying for shares as the parties really contributing towards the capital which the company was authorized to raise. It was the manifest intention of the original subscriber that the holder of his scrip certificate should be treated as his assignee and be registered accordingly as a shareholder. And the court saw nothing in the provisions of the act, or in any general principles of law, to prevent that intention from being carried into effect. (*London Grand Junction Railw. Co. v. Freeman*, 2 Railw. Ca. 504; 2 M. & Gr. 606; see *Birmingham, Bristol & Thames Junction Railw. Co. v. Locke*, 2 Railw. Ca. 667.)

Registered
purchases of
scrip liable
to calls.

A purchaser of scrip certificates for shares in a railway company is not liable for calls until his name is entered on

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*the sealed register of shares. It seems that the same is required both in the case of an original subscriber and a transferee of scrip. (*Newry and Enniskillen Railw. Co. v. Edmunds*, 2 Exch. 118; 5 Railw. C. 275.)

Purchaser
of scrip
when liable.

Contracts for the sale of railway shares are not within the stock jobbing act, 7 Geo. 2, c. 8. (*Hewitt v. Price*, 3 Railw. C. 175; 5 Scott, N. R. 229; 4 Man. & G. 355.) For a statute which is so penal is not to be enlarged beyond the strict subject matter to which it relates, namely, jobbing in the public stocks or funds. Therefore a sharebroker cannot decline answering a bill in chancery for an account or discovery respecting shares, on the ground that it will render him liable to penalties. *Short v. Mercier*, Law J. 1849, Ch. 490; 2 De G. & S. 635; 3 Mac. & G. 205; *Fisher v. Price*, 11 Beav. 194.) (1)

(1) But a colorable contract for the sale and purchase of Railway shares, where neither party intends to deliver or to accept the share, but merely to pay "differences" amounting to, the rise or fall of the market—is gaming within the 8 & 9 Victoria, chap. 109 Sect. 18. *Grizewood v. Blane*, 20 Eng. Law & Equity Rep. 290.

A purchase by brokers in pursuance of the order of a customer of shares in a projected railway company provisionally registered was held not to be illegal, but a sufficient ground for the admission of a proof tendered by the brokers for the loss occasioned by the non-completion of the purchase by the customer. (*Ex parte Barton*, 1 De Gex, 316.)

A contract for the sale of "shares" in a projected railway is satisfied by a tender of a "letter of allotment," where from the circumstances it may be inferred that the parties dealt upon the footing of such document being equivalent to scrip, and consequently there may be a complete breach of such a contract before the actual existence of any "scrip" or "shares" properly so called. (*Tempest v. Kilner*, 3 C. B. 249.)

A sharebroker employed to purchase shares or scrip of a railway company does not thereby undertake to procure them absolutely and at all events, but only to use due and reason-

Orders to
purchase
shares.

able diligence to endeavor to do so. (*Fletcher v. Marshall*, 8 & 9 Vict. c. 16. 15 M. & W. 775 ; 5 Railw. C. 340.)

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A. employed B., a sharebroker at Manchester, and lodged money in his hands to procure for him fifty shares in a certain railway company. B., without disclosing the name of his principal, entered into a contract with H., another sharebroker, to purchase them for him. According to the usage of the stock exchange at Manchester, there are two "settling days" in each month, on which all transactions between brokers and between them and their principals are to be settled, although in some instances settlement is not enforced by brokers on the prescribed days. H. did not perform his contract with B. by the next settling day, and B. having after that day refused to return A. his money, it was held, that A. was entitled to recover it back from B. in an action for money had and received. (*Ib.*)

The directors of the projected Kentish Coast Railway Company having resolved not to issue scrip, some of the members without their knowledge issued scrip signed by the secretary from the office of the company. This scrip found its way into the share market, and was sold there at a premium. The plaintiff employed his broker to buy him some *Kentish Coast Railway scrip, and the broker applied to the defendant, who sold him some of the above scrip. In an action to recover the price paid to the defendant as having sold a spurious article: it was held, that the question for the jury was, whether the plaintiff intended to buy and the defendant to sell that which was current in the market as Kentish Coast Railway scrip or the real scrip of that company. (*Lamert v. Heath*, 4 Railw. C. 302 ; 15 Mees. & W. 486.)

[*94]

The defendant gave an order to a stockholder to purchase shares in a foreign railway. There were no shares in the market and the broker bought a letter of allotment, it being the practice of the stock exchange at that time to buy and sell letters of allotment, as shares in that railway. In an action to recover the value of the shares and the broker's commission it was held, that the question for the jury to decide

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[*94]

was, whether the order had reference to that which alone could be bought in the market at that time, or was an order to buy at a future time, when, by the passing of the act for making the railway in Belgium, actual shares would be the subject of transfer and sale. (*Mitchell v. Newhall*, 4 Railw. C. 300; 15 Mees. & W. 308.)

The defendants, sharebrokers, pursuant to the orders of the plaintiff purchased for him, in their own names, railway scrip for the next account day (29th of August): on the 26th of August the plaintiff transmitted to the defendants the purchase money, and requested them to forward him the scrip. The company had called in the scrip for registration on the 22d of August, and the sealed certificates were not issued until December, and in the mean time a call was made, which was necessarily paid by the vendors. The plaintiff, in December, being called on to take up the shares and pay the amount of call, and 30s. for stamp, repudiated the transaction on the ground "that it fell within his province to pay the call when and how he pleased, and without being subject to 30s. expense," and the shares were resold at a loss which was paid to the vendors by the defendants. In assumpsit for money had and received, to recover back the original purchase money, it was held, that the contract was for the delivery of scrip on the 29th of August, if not then called in, otherwise of share certificates as soon as they should be issued, and that the action was not maintainable. (*McEwen v. Woods*, 5 Railw. C. 335; 11 Q. B. 13.)

Usage of
share market
how far
binding.

A party who employs a sharebroker, at a particular place, to transact business for him, must be taken as dealing with him according to the usage of the share market at that place, and is bound by it. (*Pollock v. Stables*, 12 Jur. 1043; Law J. 1848, Q. B. 352; *Sutton v. Tatham*, 10 Ad. & E. 27.)

The defendant having employed the plaintiff, a sharebroker at Liverpool, to sell twenty railway scrip for him, the plaintiff sold them to F., another Liverpool sharebroker. The defendant not having delivered the shares to the purchaser at the time when they ought to have been delivered, the latter bought twenty other scrip in the market at an advanced

*price, and applied to the plaintiff for the difference between the contract price and that at which he bought them. The plaintiff paid the differences, and brought an action against the defendant for money paid to recover the amount. By the usage of the Liverpool share market, brokers are responsible to each other for the fulfilment of contracts relating to the sale and purchase of scrip. It was held, that the defendant was liable to the plaintiff, and that the defendant would have been liable even if he had not been cognizant of such usage. (*Bayliffe v. Butterworth*, Law J. 1848, Exch. 78; 5 Railw. C. 283.)

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The defendant ordered the plaintiff, a stockbroker, to purchase for him twenty shares in a certain railway at a certain price, which the plaintiff did accordingly. The defendant paid the amount, with commission, and the transfer was made. Before the sale a call had been made, but was not then due, and no mention was made of it. Immediately after the sale the vendor paid up the call, though not then due, which was necessary for the validity of the transfer. The plaintiff, pursuant to a rule of the stock exchange, paid the amount of the call over to the vendor. It was held, that the defendant, in employing a stockbroker on the stock exchange, must be taken to have contemplated that which was the rule of the stock exchange; and that the plaintiff was entitled to recover from the defendant the amount paid over, in an action for money paid to the defendant's use. (*Bayley v. Wilkins*, 13 Jur. 883; 18 L. J. C. P. 273; 7 C. B. 886.)

The defendant, a sharebroker, bought for the plaintiff, also a sharebroker, shares in the S. S. Railway, and sent to him an account debiting him with only the premium, and not the deposit, though the defendant had paid both. Afterwards the defendant sold the same shares for the plaintiff and sent him an account, crediting him with a sum made up of both premium and deposit. The plaintiff bought and sold those shares for his own principals, and debited or credited them at the prices charged as above to himself, on the purchase and sale by the defendant. It was held, that the de-

Transactions
between two
sharebrokers.

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Sect. 9. defendant was not precluded from charging the plaintiff with the deposit on the first transaction, but upon the plaintiff bringing assumpsit for a balance, might set off such deposit. (*Dails v. Lloyd*, 12 Q. B. 531; 5 Railw. C. 572.)

The defendant bought also for the plaintiff shares in the T. and D. Railway, which were then only unissued scrip, so that no deposit was payable. By the customs of the market (Liverpool), the price does or does not include the deposit, according as the scrip has issued or not, and the published share list shows how this is. The defendant, before the scrip issued, sent to the plaintiff bought and sold notes, stating the price, without the deposit; but he daily sent to the plaintiff the share lists. After the scrip issued, the defendant paid the deposit, but he still omitted, in accounts afterwards sent, to debit the plaintiff with the deposit. The plaintiff had made these purchases for his own *principals, and he debited them at a price not including the deposit; but whether the contract as between him and the principals was a time bargain, or shares were actually delivered, did not appear: it was held, that the defendant was not upon either supposition, precluded from charging for the deposit, and setting it off, as in the former case. (*Ib.*)

[* 96]
Sale of forged
scrip certifi-
cates.

The defendant, on the 10th of March, 1847, employed the plaintiffs, who were stock and sharebrokers, to sell for him ten scrip certificates for fifty shares each in a projected railway company, and then delivered the certificates to them for that purpose. The plaintiffs, on the 27th of March, sold them to different purchasers, and paid the defendants the proceeds of the sales. The certificates were afterwards discovered to be forged, and the plaintiffs were called upon by the purchasers, on the 11th of May, to pay them respectively the value put on them by a resolution of the stock exchange committee, passed with reference to the forged certificates in that railway company, of which there were several in the market, and which resolution was come to subsequently to the sales by the plaintiffs. The plaintiffs accordingly paid those sums, which were larger than the sums for which they

had sold the certificates. The present action was brought to recover the sums so paid by the plaintiffs. The declaration contained a special count on an alleged warranty by the defendant that the certificates were genuine, and a count for money paid. The defendant paid into court the amount received by him from the plaintiffs, with interest. It was held, that the plaintiffs were not entitled to recover. That the first count failed, inasmuch as the law only implies a promise by a principal to indemnify his agent when acting according to his instructions, and no express promise was proved. That the common counts also failed, because the sale was void on account of the forgery, and the purchasers were therefore (independently of stock exchange rules) entitled to nothing more from the plaintiffs than the sum the purchasers had paid them, and consequently that the plaintiffs could recover no more from the defendant, and that no difference was produced by the stock exchange resolution, it being made subsequently to the sale by the plaintiffs, and there being no rule of the stock exchange at the time of the sale which required brokers to be bound in respect of their contracts by resolutions to be made on the subject. (*Westropp v. Solomon*, 19 L. J. C. P. 1; 8 C. B. 345.)

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X. In addition to the said register of shareholders, the company shall provide a book, to be called the "shareholders' address book," in which the secretary shall from time to time enter in alphabetical order the corporate names and places of business of the several shareholders of the company, being corporations, and the surnames of the several other shareholders with their respective christian names, places of abode and descriptions, so far as the same shall be known to the *company; and every shareholder, or if such shareholder be a corporation, the clerk or agent of such corporation, may at all convenient times peruse such book gratis, and may require a copy thereof or of any part thereof; and for every hundred words so required to be copied the company may demand a sum not exceeding sixpence (o).

Addresses of
shareholders.

[*97]

(o) Where a member of the managing committee of a railway company undertook to wind up their affairs, and by his

Orders for
inspection.

8 & 9 VICT. c. 16. attornies, who were also the attornies of the company, possessed himself of the parliamentary contracts and subscribers' agreement, the court made an order allowing the plaintiff or his attorney to inspect and take copies of the deeds as they were in the defendant's hands as trustee for all the parties interested, although the attornies claimed to have acquired a lien upon them. (*Lee v. Barlow*, 5 Railw. C. 1; 1 Exch. 800; 5 D. & L. 373.)

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Liberty to inspect similar deeds was granted to an allottee of shares, who sued a member of the provisional committee for a return of his deposit, and who swore that inspection was necessary for framing his case. (*Steadman v. Arden*. 15 M. & W. 587; 4 D. & L. 16; see *Shaw v. Holmes*, 3 C. B. 952.)

Common law courts authorized to compel the inspection of documents whenever equity would grant discovery.

Whenever any action or other legal proceeding shall be pending in any of the superior courts of common law at Westminster or Dublin, or the Court of Common Pleas for the County Palantine of Lancaster or Durham, such court and each of the judges thereof may respectively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same, or to procure the same to be duly stamped in all cases in which previously a discovery might have been obtained by filing a bill or by any other proceeding in a court of equity, at the instance of the party so making application as aforesaid to the said court or judge. (14 & 15 Vict. c. 99, s. 6. See *Pepper v. Chambers*, 7 Exch. 226; *Sneider v. Mangino* 7 Exch. 229; *Doe d. Child v. Roe*, 1 Q. B. N. S. 279.)

In certain cases the defendant, after answer and without filing any cross bill of discovery, may file interrogatories for the examination of the plaintiff; but the defendant, if he

think fit, may exhibit a cross bill of discovery against the plaintiff instead of filing interrogatories for his examination. (15 & 16 Vict. c. 86, s. 19.)

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c. 16.
Sect. 10.

Upon the application after answer of a defendant in a suit in chancery, the plaintiff may be required to produce documents relating to the matters in question. (*Ib.* s. 20.)

Where a canal act gives the control over the company's affairs to a committee, and authorizes every proprietor to inspect the books in which the committee are directed to enter accounts, &c., a mandamus will not be granted to compel the company to permit the proprietor to inspect the books where there has been no refusal by the committee, although there has been a direct refusal by the clerk in whose possession the books are. (*Rex v. Wiltshire Canal Co.*, 5 N. & M. 344; 3 Ad. & E. 477.)

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XI. On demand of the holder of any share the company shall cause a certificate of the proprietorship of such share to be delivered to such shareholder; and such certificate shall have the common seal of the company affixed thereto: and such certificate shall specify the share in the undertaking to which such shareholder is entitled; and the same may be according to the form in the schedule (A.) (*p*) to this act annexed, or to the like effect; and for such certificate the company may demand any sum not exceeding the prescribed amount, or if no amount be prescribed, then a sum not exceeding two shillings and sixpence (*q*).

Certificates of
shares to be
issued to the
shareholders.

(*p*) See Appendix of Forms.

(*q*) Before the passing of a railway act, A. signed the subscribers' agreement and parliamentary contract for shares and paid a deposit of £—— per share, upon which scrip certificates were delivered to him, which contained a notice that they were not transferable before the act should pass. The act passed (6 Will. 4, c. lxxvii.), containing the following provisions. By section 5, the mode for a party to become a subscriber is by subscribing the parliamentary contract, or becoming an assignee afterwards, according to the

Dispensation
with the pre-
scribed mode
of becoming
a proprietor
of shares.

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statute. Section 138 requires the names of proprietors from time to time to be entered in a book, to which their common seal is to be affixed, and provides for the delivery of a sealed ticket to every registered proprietor on demand. And section 148 authorizes proprietors of shares to sell them, by conveyance in writing to be kept by the company, who are to enter in a book a memorial of the transfer, and make an endorsement of such entry on the deed of transfer, and of the transfer on the certificate of each share sold; and until such memorial shall have been made and entered, the seller is to be liable for calls, and the purchaser not be entitled to any privileges. After the passing of the act, the company made out a list of proprietors, in which A.'s name was inserted as proprietor of — numbered shares. They also issued circulars requesting to know what numbers the several proprietors intended to retain. In reply, A. stated that he had disposed of the numbers standing in his name, and soon afterwards the defendant sent in the scrip certificates which had been delivered to A., *claiming to be registered as proprietor* in respect thereof. He accordingly received from the company a receipt for the scrip certificates, with a notice that they would be exchanged for sealed certificates on demand. The defendant never applied for or received them; nor was any regular transfer made by him or A., or any memorial of *transfer entered, as required by the act. It was held, that notwithstanding the provisions of the act necessary to make him a proprietor had not been complied with, the defendant by his representation and claim to be registered had precluded himself from taking advantage of such objection, and was therefore liable for the calls on his shares; and that this being matter of estoppel *in pais*, might be used in evidence as an answer to the defence without being pleaded. (*Cheltenham and Great Western Union Railw. Co. v. Daniel* 2 Railw. C. 728; 6 Jur. 577; 2 Q. B. R. 281.)

[*99]

Before the passing of the act 6 & 7 Will. 4, c. civ., A. and B. became respectively possessed of scrip certificates of

certain shares which had belonged to subscribers to an undertaking, to procure an act of a railway company, and the certificates stated respectively, that the holders having signed the parliamentary contract required by the standing orders, and agreed to pay all calls, were the proprietors of shares, &c. A. and B. had not signed the contract, nor executed any formal subscription to the undertaking. After the passing of the act the company advertised for holders of scrip to bring it in to be registered. A. and B. brought in their certificates accordingly, and the shares were registered in their respective names. No memorial of sale to either was ever entered, as was required by the act. A. afterwards attended a half-yearly meeting of the company, and B. paid a call on his shares. In an action against A. and B. for calls, it was held, that the absence of proof as to subscription, and the want of a memorial, did not prevent A. or B. from being liable as proprietors. *London Grand Junction Railw. Co. v. Graham*, 1 Q. B. R. 271; 2 Railw. C. 870. See *ante*, p. 92.)

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c. 16.
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[99]

To assumpsit by assignees of a bankrupt, for the non-acceptance of shares in the Great Western Railway Company, which the bankrupt before his bankruptcy had contracted to sell the defendant, and to convey to him on a day subsequent to the bankruptcy, the declaration averring that the plaintiffs were the proprietors of the shares, and that they tendered certificates of them to the defendant, the defendant pleaded, amongst other things, that the plaintiffs were not proprietors of the shares, and that they did not tender certificates of them to the defendant. In order to prove their proprietorship of the shares, the plaintiffs put in the transfer book kept by the Great Western Railway Company under the Railway Act, 6 & 7 Will. 4, c. cvii. s. 158, in which the plaintiffs were entered as transferees. It was held that this was not sufficient evidence of their title. The certificates tendered by the plaintiffs to the defendant did not contain the names of the plaintiffs as original proprietors, nor had they any indorsement of transfer to them. It was held, that such certificates were insufficient, inasmuch as they did not show a

Insufficient
evidence of
title

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title in the plaintiffs to convey the shares under the act. Sects. 147, 158. (*Hare v. Waring*, 3 M. & W. 362; see *Latham v. Barber*, 6 T. R. 67.)

[*100]
Action
against sec-
retary for
not deliver-
ing certi-
ficates to
shareholder.

*An action on the case will lie against the secretary of a company, for not making out and delivering to the plaintiff a certificate in respect of each of twenty shares purchased by him. The act constituting the Anti-dry-rot Company (6 Will. 4, c. xxvi.) provided that the company shall keep a book, and cause to be entered therein the name and designation of every person subscribing for shares in the undertaking, and of every person entitled to any share therein, making a separate entry of each share in numerical order; and that after the making of such entry, a certificate shall be made out in respect of every share specifying the number of such share and the name of the proprietor thereof, and such certificate shall be delivered to the proprietor upon demand. The proprietor of every share might sell and transfer the same by writing duly stamped, which transfer shall be exhibited to the company or their secretary, to be filed and registered in the manner prescribed by the act. At the trial the plaintiff produced in evidence twenty scrip certificates payable to bearer, signed by three of the directors, and countersigned by one T., who had been secretary to the company. It appeared that T. had fraudulently re-issued a number of the shares, and this having become known the shares, at the time the plaintiff purchased, were at a low discount. Notices had been given by the company in the public papers of the fraud which had been practised, and the broker who had negotiated the sale of the shares to the plaintiff knew of that fraud at the time. It appeared that at the time the scrip certificates were brought by the plaintiff to be registered, the whole number of 10,000 shares had been already entered in the register pursuant to the act. It was thereupon objected, that the register being full, and the defendants having no power to add to the number of shares, the action in this form would not lie; and the learned judge being of that opinion nonsuited the plaintiff. It was held that the nonsuit could not be supported, because the register

might have been improperly filled, in which case the company would be taking advantage of their own wrong. (*Daly v. Thompson*, 10 Mee. & W. 309.)

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c 16.
Sec 13.

If persons conspire to fabricate shares in addition to the limited number of which a joint stock company, according to its rules, consists, in order to sell them as good shares, they may be indicted notwithstanding any imperfection in the original formation of the company. It was questioned whether scrip receipts given by the bankers of such a company for sums paid on deposits can be properly described as shares in the indictment, such receipts not having become shares, but being only things which might be made shares. (*Rex v. Mott*, 2 Carr. & P. 521; see *ante*, p. 19, n.).

Indictment
for fraudulent
issue of scrip.

XII. The said certificate shall be admitted in all courts as prima facie evidence of the title of such shareholder, his executors, administrators, successors, or assigns, to the share therein specified; nevertheless *the want of such certificate shall not prevent the holder of any share from disposing thereof (r)

Certificate
to be evi-
dence.

[*101]

(r) See *Birmingham, Bristol, and Thames Junction Railw. Co. v Locke*, 2 Railw. C. 867; 2 Q. B. R. 256; 8 & 9 Vict. c. 16, s. 30, *post*, note.

XIII. If any such certificate be worn out or damaged, then upon the same being produced at some meeting of the directors, such directors may order the same to be cancelled, and thereupon another similar certificate shall be given to the party in whom the property of such certificate, and of the share therein mentioned, shall be at the time vested; or if such certificate be lost or destroyed, then upon proof thereof to the satisfaction of the directors, a similar certificate shall be given to the party entitled to the certificate so lost or destroyed and in either case a due entry of the substituted certificate shall be made by the secretary in the register of shareholders: and for every such certificate so given or exchanged the company may demand any sum not exceeding

Certificates
to be renew-
ed when
destroyed.

8 & 9 VICT. the prescribed amount, or if no amount be prescribed, then a
 c. 16. sum not exceeding two shillings and sixpence.
 Sect. 14.

Transfer of Shares.

And with respect to the transfer or transmission of shares, be it enacted as follows :

Transfers of
 shares to be
 by deed duly
 stamped.

XIV. Subject to the regulations herein or in the special act contained, every shareholder may sell and transfer all or any of his shares in the undertaking, or all or any part of his interest in the capital stock of the company, in case such shares shall, under the provision hereinafter contained, be consolidated into capital stock ; and every such transfer shall be by deed duly stamped, in which the consideration shall be truly stated ; and such deed may be according to the form in the schedule (B.) (s) to this act annexed, or to the like effect (t).

(s) See Appendix of Forms.

Power to
 transfer
 shares de-
 rived from
 the act.

(t) The power to transfer shares in a company is the result of the act of incorporation, [and the powers given by it. (*Jackson v. Cocker*, 4 Beav. 63.) Members of corporations cannot assign their interest and force their assignees into the corporation, without the authority of an act of parliament. Such authority is expressly given by the Bank Acts, the South Sea Acts, and by other statutes creating companies that possess stock which it was deemed proper should be rendered transferable. (*Duvergier v. Fellows*, 5 Bing. 267 ; *Blundell v. Winsor*, 8 Sim. 601.)

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Tender of
 conveyance.

*To enforce a contract for transfer of railway shares, if such a transfer requires a deed, the purchaser must tender the conveyance to the vendor for execution ; the same rule prevailing as on sales of real property. It was so held where the railway act (6 & 7 Will. 4, c. 77) gave a very short and simple form of transfer under seal, and made shares personal property. And a declaration by the purchaser against the vendor for not having completed the contract of sale, stating that the defendant promised to make over and transfer the shares in a reasonable time, and that the plaintiff was

ready and willing to pay for and accept the shares, and requested the defendant to make over and transfer them, but the defendant did not nor would make over, &c., but neglected and refused, was held bad on special demurrer, for not averring that the plaintiff tendered a conveyance. (*Stephens v. De Medina*, 4 Q. B. R. 422; 3 Railw. C. 454.)

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The defendant authorized the plaintiff, a broker, to sell certain shares in a railway then lying at the company's office for registration. The plaintiff sold them to R. Some correspondence took place between the plaintiff and defendant on account of some delay in the transfer of the shares, and ultimately the defendant wrote a letter to the plaintiff, requesting that all further communication should be made to his attorney. The transfer not having been made, R., after giving the plaintiff notice bought the same number of shares at an advance in price, and charged the plaintiff with the differences, which the plaintiff paid, and then sued the defendant for the amount. It was held, first, that the plaintiff, was authorized to sell registered shares only; secondly, that inasmuch as no valid transfer could be made except by deed under this section of the act, R. was bound to have tendered a deed of transfer before he could have recovered against the plaintiff, and not having done so the plaintiff made the payment to him in his own wrong; thirdly, that the above mentioned letter did not amount to a refusal to complete the contract so as to dispense with a tender of a deed of transfer. (*Bowlby v. Bell*, 4 Railw. C. 692; 3 C. B. 284.)

The London and Brighton Railway Act (1 Vict. c. cxix. s. 135 provides, that the form of conveyance of shares shall be by writing, duly stamped, under the hands and seals of the parties, and that on every sale the *deed* or *conveyance* shall be kept by the company, and an entry of the memorial of such transfers and sale shall be indorsed on the said *deed* of sale or transfer. Section 157 provides against any transfer of shares till all the calls on them are paid. The plaintiff in September having agreed to sell to the defendant fifty shares, to be delivered on the 1st March, bought of R. W. P. (through

Transfer
must be by
deed.

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brokers) fifty shares, to be delivered on the 15th December next, on which day R. W. P. delivered to him fifty certificates, and three transfers for shares, with blanks for the purchaser's name, the consideration, and the date. On the 1st March the plaintiff tendered these certificates and transfers to the defendant, who refused to accept them; *at the time there were some calls due, but that objection was waived. In an action brought to recover the difference of price between December and March, it was held, that as the conveyance required by the statute was a *deed*, and that an instrument of transfer executed by the owner of the shares, with a blank for the name of the purchaser, and delivered to the plaintiff, by whom, on sale of them, the name of the purchaser was to be inserted, was void; and that the non-payment of the calls would have been a valid objection, but that a waiver of it by parol was sufficient to remove it; it seems that the plaintiff could not give the defendant an implied covenant for title, R. W. P. being the actual owner of the shares. (*Hibblewhite v. M'Morine*, 2 Railw. C. 51; 6 Mee. & W. 200; 8 Dowl. 802; 4 Jur. 769.)

In an action of assumpsit the plaintiff alleged that the defendant had agreed to purchase from him certain shares in a railway company, and that although he was at all reasonable times ready and willing to transfer the shares the defendant refused to accept them. It appeared that the company in question was constituted by an act of parliament passed subsequently to this act, that the contract for the sale of the shares was made on the 15th of October, 1845, the purchase to be completed on the 31st; but before that day a call was made on the shares, and that the plaintiff without paying that call required the defendant to complete his bargain, which the defendant refused to do. It was held, that the averment of the plaintiff's readiness and willingness to transfer the shares was not disproved. (*Shaw v. Rowley*, 11 Jur. 911; Law J. 1847, Exch. 180; 5 Railw. C. 47; 16 Mee. & W. 810.)

Non-registration—
estoppel.

A transfer of railway shares from an original subscriber to the undertaking, made before the formation of a register

of proprietors pursuant to the act, but after the passing of ^{8 & 9 VICT.} the act of parliament, is good although the transferor be ^{c. 16} never registered as a proprietor. (*Sheffield, Ashton-under-Lyne and Manchester Railw. Co. v. Woodcock*, 7 Mee. & W. 574; 2 Railw. C. 522.) Where the act required such transfer to be by deed, and a transfer of shares was executed by the seller with a blank for the purchaser's name and stating the consideration untruly; but the purchaser afterwards signed and transmitted to the company, in pursuance of the act, a proxy paper, describing him as the proprietor of the shares: it was held, in an action by the company against him for calls on such shares, that he was precluded from disputing the validity of the transfer. (*Ib.*)

The plaintiff contracted to buy of the defendant shares in a joint stock company; the deed of settlement of which provided that the assent of the directors to a transfer should be necessary in order to complete the title of the purchaser. The plaintiff's broker made out the transfers, and procured the signature of the defendant to them; and the plaintiff paid the price contracted to be given for the shares. The directors, however, in consequence of some dispute with the defendant refused to assent. It was held, first, that it was *the duty of the defendant to procure the assent of the directors, and to do all that was necessary to invest the plaintiff with the property in the shares; and that, on his failure to do this, an action for money had and received might be maintained by him against the defendant to recover the price he had paid for the shares; and, secondly, that the return of the transfer was collateral to the contract of purchase, and not a condition precedent to the plaintiff's right to recover the purchase money. (*Leeman v. Lloyd*; *Wilkinson v. Lloyd*, Law J. 1845, Q. B. 165; 9 Jur. 328; 7 Q. B. 27.)

Vendor of shares must obtain consent of directors to transfer.

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The deed of transfer was executed by A., the seller, with the name of B. inserted as the purchaser: before any execution of the deed by B. it was arranged that C. instead of

Alteration of deed.

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B. should be the purchaser, whereupon the name of B. being struck out and that of C. substituted, A. re-executed the altered deed: it was held, that the deed was so far complete as between A. and B. that it could not operate as a conveyance to C. without a new stamp. In answer to the objection that the deed upon the face of it had been altered by the substitution of a new transferee, it was contended that the insertion of the original name was made by mistake, and that whilst the matter was still *in fieri* the seller had a right to correct such mistake by inserting the name of the real purchaser. But the court was of opinion that, admitting such alteration might have been made without destroying the validity of the instrument under such an assumed state of facts, yet that it was incumbent upon the plaintiffs, who produced and relied upon the deed in its altered shape, to show the circumstances under which the alteration was made, and that such a state of facts had really existed; for the deed would have an operation at common law, independently of any effect to be given to it under the particular statute, and that the power of the stamp would be exhausted by such operation of the deed by the common law, and that if it appeared to be an unstamped deed on its production, any further matter therein stated by the secretary of the company could not give validity or efficacy to the transfer. (*London and Brighton Railw. Co. v. Fairclough*, 2 Railw. C. 544; 2 Mann. & Gr. 674; 3 Scott, N. R. 68.)

Stamp on
transfer:

By a deed of settlement, shares were made transferable, and the directors were empowered to regulate the transfer, and to require in respect of such transfer a covenant from the transferee to observe the company's regulations as to holders of shares. The directors prescribed a form of transfer under seal, by which the shareholder conveyed his share to the transferee, to hold subject to the regulations and covenants contained in and resolved upon pursuant to the deed of settlement, and the transferee covenanted with the

party conveying, and also separately with the trustees on behalf of the company, to abide by and perform all the said regulations, &c. It was held, that such transfer required an *ad valorem* stamp only, and not an additional stamp under stat. 55 Geo. 3, c. 184, sched. part 1, title "Conveyance," *as containing [matter besides that which "was incident to the sale and conveyance of the property sold." (*Wolseley v. Cox*, 2 Q. B. R. 320; Law J. 1842, Q. B. 9; 6 Jur. 599.)

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c. 16.
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A deed by which several persons jointly convey their separate interests in certain shares in an incorporated company, does not require several stamps, but one *ad valorem* stamp is sufficient. A. being entitled to twenty shares in an incorporated company, B. to twenty, and C. to ten joined in conveying the same by the same deed to D. The several interests did not appear in the deed, and the *ad valorem* stamp was calculated upon the whole shares. It was held, that a single deed stamp only was necessary. (*Wells v. Bridger*, 18 L. J. Exch. 384; 4 Exch. 193.)

A parol agreement for the sale of railway shares is binding; for they are neither an interest in or concerning lands, within the fourth section of the statute of frauds, (29 Car. 2, c. 3,) nor goods, wares, or merchandize, within the 17th section of that act. (*Duncuft v. Albrecht*, 12 Sim. 189; see *Hebblewhite v. M' Morine*, 6 Mee. & W. 200, ante, p. 103; *Adderley v. Dixon*, 1 Sim. & S. 607; *Ex parte Lancaster Canal Co.*, Mont. 116; *Humble v. Mitchell*, 2 Railw. Co. 70; *Bradley v. Holdsworth*, 3 Mee. & W. 422, ante, p. 86.)

Chancery
will decree
specific per-
formance of
sale of rail-
way shares.

Scrip in a railway company is not "goods, wares or merchandize" within the exemption in the stamp act 55 Geo. 3, c. 184, sched. part 3, Agreement. (*Knight v. Barber*, 2 Carr. & K. 333; 16 Mee. & W. 66; Law. J. 1847, Exch. 18; see ante, p. 92.)

A contract for the sale of shares in a projected railway is not within the statute of frauds. (*Tempest v. Kilner*, 3 C. B. 249.)

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What amounts to such an agreement between a Railway company, and a land-owner for a sale as a Court of Equity will decree to be specifically performed.

Action lies for non-performance of agreement to sell shares.

It has long been decided that a bill cannot be sustained for the specific performance of an agreement to sell stock. (*Nutbrown v. Thornton*, 10 Ves. 159; *Withy v. Cottle*, 1 Sim. & S. 174; see *Doloret v. Rothschild*, 1 Sim. & S. 590.) But the Court of Chancery will decree a specific performance of an agreement for the sale of shares in an incorporated railway company. There is no sort of analogy between a quantity of three per cents., or any other stock of that description, (which is always to be had by any person who chooses to apply for it in the market,) and a certain number of railway shares of a particular description; which railway shares are limited in number, and which are not always to be had in the market. (*Duncuft v. Albrecht*, 12 Sim. 189; *Shaw v. Fisher*, 5 Railw. C. 461; 2 De G. & S. 11.) (1).

(1) Where a Railway Company served a land owner with a notice to treat for the purchase of a portion of his land, the land owner in the particulars of his claim, stated that he was seized in fee simple of the land required by the company, subject to an unexpired term therein and a reserved rent of £32 13s. and that he claimed £1,500 for the purchase of his interest.

The company by their agent agreed to pay the sum claimed. An abstract of title was then delivered to the Solicitor of the company who was also informed that the rent of £32 13s. was payable in respect of other land belonging to the plaintiff as well as of that required by the company, and that it must be apportioned. The company claimed the whole rent, and refused to complete their contract on any other terms.

On a Bill filed by the Landholder against the Company, the Court affirming the decision of the Court below, decreed a specific performance of the contract. *Inge v. Birmingham W. & S. V. Railway Company*, 23 Eng. Law & Equity, 601.

At law actions will lie for not accepting shares agreed to be sold. The remedy for the breach of contract for the sale of shares is an action for special damage for not completing the contract within a reasonable time. (*Humble v. Langston*, 7 Mees. & W. 526.)

In an action for non-acceptance of railway shares, pursuant to a contract for sale entered into by two parties through the medium of brokers, the rules of the Liverpool *Stock Exchange, of which neither of the brokers were members, but which were shown to be the rules by which brokers in Liverpool were in general guided in similar transactions, are receivable in evidence for the purpose of showing what was a reasonable time to allow the seller to transfer the shares. (*Steward v. Cauty*, 8 Mee. & W. 160; 5 Jur. 411; 2 Railw. C. 616.) In such action the proper measure of damages is the difference of the prices of the shares on the day when they ought to have been accepted, and on the day when they were resold by the vendor, such resale being within a reasonable time. (*Id.*) Where the agreement is to deliver a share on demand, an action for not transferring the share cannot be maintained without proof of demand. (*Green v. Murray*, 6 Jur. 728.)

In an action on a contract for not delivering railway shares, the measure of damages is the difference between the price of the shares at the time of the contract, and the day on which it is broken, allowing the purchaser a reasonable time, however, to purchase other shares. (*Shaw v. Holland*, 4 Railw. C. 150; 15 Mees. & W. 136.)

The vendee of shares in a projected railway under a contract to be completed at a future day may recover as damages for the non-delivery, the difference between the price agreed on and the market price of the day on which the sale should have been completed, but that he is not entitled to damages in respect of a further advance of price taking place afterwards at the time of the actual issuing of the scrip. (*Tempest v. Kilner*, 3 C. B. 253.)

The plaintiffs on the 20th October, 1845, sold the defendant twenty railway shares at 25s. premium, no day being mentioned for the delivery of the scrip. On the 21st October the shares had fallen to 14s. premium, and on that day, but after business hours, the defendant gave the plaintiffs notice that he should not take the shares. On the 22d the

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shares were at 8s. premium, and the price continued to fall till the 6th of December, when the plaintiffs sold the shares at 17s. discount. An action being brought for breach of the defendant's contract, it was held that the proper measure of damages was the difference in price between the 20th and 22d October. (*Pott v. Flather*, 11 Jur. 735; 16 Law J. Q. B. 366; 5 Railw. C. 85.)

In detinue for the detention of certain railway scrip re-delivered to the plaintiff after action brought and before verdict, the jury may, as a measure of damages, take into consideration the difference between the value of such scrip at the time of the demand, and their value at the time of such re-delivery. (*Williams v. Archer*, Law J.; 1848, C. P. 82, Exch. Chamb.; 5 Railw. C. 289.)

How damages to be calculated.

In May, 1840, A. agreed with B. for the purchase of railway shares at £—— per share. On the 4th August A. writes to say, that "having received certain information as to some misrepresentation at the time of the contract, he gives notice that he shall consider the contract null and void should such information prove correct." On the 22d of

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*August he gives a verbal notice of his intention of abandoning the contract, which notice he confirms by a letter of the 24th, in which he refers to that of the 4th for his reasons. The shares were by consent formally tendered to and rejected by A. on the 20th October. In an action brought by B. for the loss occasioned by the difference between the price then and at the time of the contract, it was held that it was properly left to the jury to say when the contract was finally repudiated, and that they having considered it not to be so until the tender and refusal of the shares, and having given as damages the difference in value then, and not at the time of the notice given on the 4th or 22d, the court refused to grant a new trial. (*Barneid v. Hamilton*, 2 Railw. C. 624.)

Estoppel.

A demise by deed, at a certain rent, of the dividends to arise from railway shares, contained a covenant to pay the rent. Upon an action on this covenant, the declaration com-

menced by stating, that the plaintiff was possessed of or entitled to shares in a certain railway company, and then stated the deed of demise, and set out the material portions of the deed, the covenant to pay the rent, and a breach of that covenant; the deed was out upon oyer. The defendant pleaded, that the plaintiff was not possessed of or entitled to shares in the said railway company: it was held, upon special demurrer, that the defendant was estopped by the deed from pleading the above plea, notwithstanding that the fact of the plaintiff's possession of shares was stated, independently of the deed, in the introductory part of the declaration. It was held also, that the estoppel sufficiently appeared upon the pleadings, and that it was not necessary to reply to it. (*Beckett v. Bradley*, Law J. 1845, C. P. 3; 7 Man. & G. 994.)

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XV. The said deed of transfer (when duly executed) shall be delivered to the secretary, and be kept by him; and the secretary shall enter a memorial thereof in a book to be called the "register of transfers," and shall endorse such entry on the deed of transfer, and shall on demand deliver a new certificate to the purchaser; and for every such entry, together with such endorsement and certificate, the company may demand any sum not exceeding the prescribed amount, or if no amount be prescribed, then a sum not exceeding two shillings and sixpence; and on the request of the purchaser of any share an endorsement of such transfer shall be made on the certificate of such share, instead of a new certificate being granted; and such endorsement, being signed by the secretary, shall be considered in every respect the same as a new certificate; and until such transfer has been so delivered to the secretary as aforesaid, the vendor of the share shall continue liable to the company for any calls that may be made upon such share, and the purchaser of the share shall not be entitled to receive any share of the profits of the undertaking, or to vote in respect of such share (*u*).

Transfers of
shares to be
registered,
&c.

(*u*) The practice has usually been for a broker to settle the price or value of the share between the vendor and the purchaser, and a printed form of transfer is filled up except as

Practice on
sale of shares.

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to the purchaser's name, which being left blank, the deed is signed by the vendor, and delivered to the purchaser. The deed bears the stamp of the *ad valorem* duty, according to the price actually paid; but from that moment the transfer passes from hand to hand, possibly for many months, without the payment of any duty upon the several transactions subsequent to the first; by which not only is the duty evaded in these subsequent cases, but if the value of the shares continues to increase, no reference whatever is had to that increase in the several transfers subsequent to the first, and the deed is not filled up until, for some reason or other, a purchaser thinks proper to register his share, and then the transfer is filled up with his name, and taken to the office of the company. (2 Rep. on Railways, 9th Aug. 1839, No. 517, p. iv.) There are several objections in point of law to this practice (*ante*, pp. 102, 103, note), and a vendor of shares may insist upon not delivering a blank conveyance to the vendee, unless the purchaser will indemnify him against all intermediate calls, in which case it seems the vendor will be safe. (*Humble v. Langston*, 2 Railw. C. 541, 542; 7 Mee. & W. 517.)

Until the deed of transfer upon the sale of railway shares has been registered by the transferee, whose duty it is to procure such deed to be registered; the transferor continuing the registered owner, is liable for all subsequent calls, and cannot after he has been compelled to pay the amount of such calls recover the same from the transferee, upon the common count for money paid to his use. (*Sayles v. Blane* 6 Railw. C. 73; Law J. 1850, Q. B. 19; 14 Q. B. 205.)

The defendant subscribed for shares in the undertaking, and was without his consent inserted on the register: he received scrip and subsequently sold them; it was held, that he continued liable for calls so long as his name remained on the register. (*Midland Great Western Railw. Co. v. Gordon*, 5 Railw. Cas. 76; 16 M. & W. 804.)

Action
against com-
pany for non-

An action lies against an incorporated railway company, where it appears that they have been guilty of a wrongful act

of omission in neglecting to register a memorial of the transfer of shares, and also of acts of commission by declaring and confirming a forfeiture of shares and selling them, in consequence of which acts the plaintiff has suffered an actual loss, by being deprived of the ordinary privileges of shareholders, and, consequently, of any profits that might have arisen upon the shares. (*Catchpole v. Ambergate, &c. Railw. Co.*, 1 Q.B. N.S. 111. See *Reg. v. Liverpool, &c. Railw. Co.*, 16 Jur. 949.)

8 & 9 Vict.
c. 16.
registration,
and declara-
tion of for-
feiture of
shares.
Sect. 15.

It has been decided at law that there is no implied undertaking on the part of a purchaser of railway shares to indemnify the *vendor against subsequent calls made on him by the company before the shares have been registered in the purchaser's name. On the 20th February, 1838, the plaintiff entered into a contract with the defendant through their respective bankers for the sale of thirty shares in the Bristol and Exeter Railway at 17l 5s. per share, and the usual contract notes passed between the parties, no time being mentioned for the completion of the purchase. On the 3d March the defendant wrote to the plaintiff's brokers, requesting them to dispatch the thirty Bristol and Exeter shares forthwith, and they replied the same day, "We herewith send you transfer of thirty Bristol and Exeter shares in blank." This was accordingly done, and the purchase money was paid. Calls were subsequently made on these shares; and they not being registered in the name of the defendant, and the plaintiff remaining the apparent owner of them, he was compelled to pay the calls. In an action against the defendant for not indemnifying the plaintiff for the payment and liabilities in respect of the calls, it was held, that under the above circumstances there was no undertaking implied by law to indemnify against all subsequent calls, nor any evidence of such an undertaking in point of fact. (*Humble v. Langston*, 7 Mec. & W. 517; 2 Railw. C. 533; see *Burnett v. Linch*, 5 B. & C. 589.) The declaration, after setting forth the contract contained an averment that the plaintiff had always, from the time of the sale of the said shares and the making of the said promise, hitherto been ready and willing to

Continuing
liability to
calls.
[*109]

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c. 16.
Sect. 15.

transfer the shares to the defendant according to the terms of the said contract. This was traversed by plea: it was held that there was sufficient evidence in the case of such readiness, but that, if it had been necessary, in order to support the allegation, to prove the tender of a valid conveyance, it would not have been sufficient. (*Ib.*) Parke, B., observed, "If the case had rested upon the contract, the relation of the parties would have been this: the plaintiff, after showing a good title to the defendant, would have had a right to call upon him to complete his purchase in a reasonable time by preparing a deed in the statutory form; and if the defendant had done so, the plaintiff might then have executed it and required the defendant to do the same, and to deliver or attend with him to deliver the deed to the company, that a memorial might be entered into and endorsed on the deed of transfer, pursuant to the 169th sect. If all this had been done, the plaintiff would have been no longer liable to any call: if the defendant had refused to perform his part, he would have subjected himself to an action for the non-performance of that which he omitted to do; and if, in consequence of the defendant's breach of his contract, the plaintiff had been obliged to pay future calls, he might have recovered this amount by way of special damage for the defendant's breach of contract; but in this case the plaintiff did not pursue the course which according to law he ought to have done." It seems that the registered owner of shares in an incorporated company does not by a *transfer of shares get rid of his legal liability to pay calls made previously to the transfer. (*Mangles v. Grand Collier Dock Co.*, 2 Railw. C. 359.)

[*110]

Vendor of
railway
shares in-
demnified
against fu-
ture calls.

A shareholder in an incorporated railway company instructed a stock broker to sell his shares. The broker agreed with a jobber for the sale of them; but the name of the purchaser was not mentioned. The jobber had been instructed to purchase by B. (another broker), who as the jobber knew, was not purchasing on his own behalf. B. afterwards requested time for completion, his principal not being ready; and the jobber granted the time on B. giving his own name as that of the principal. A deed of assignment was prepared from the

vendor to B., who paid the price to the vendor, and took the deed of assignment executed by the vendor: it was held, upon a bill filed by the vendor, that B. was bound to execute the assignment, to procure himself to be registered, and to pay the calls made since the execution of the assignment by the vendor, and to indemnify vendor against future calls; and a decree was made to that effect. (*Wynne v. Price*, 3 De G. & S. 310; 13 Jur. 295; 5 Railw. C. 465.)

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C. 16.
Sect. 15.

[110]

A., the registered owner of certain shares in a railway company, sold the same by auction to B., who afterwards sold to a third person, but no transfer was executed, and A. remained the registered owner and liable for calls: it was held that B. was bound to do all acts necessary to relieve A. from liability in respect of the shares sold, and specific performance was decreed, subject to a special reference as to title and the amount of the calls due. (*Shaw v. Fisher*, 5 Railw. C. 461; 2 De G. & S. 11.)

Certain persons, previous to soliciting an act of incorporation for forming a railway, executed a subscribers' deed and a parliamentary contract, and they received certain scrip certificates as evidence of their subscriptions, and upon which a certain amount had been paid. The act of incorporation passed, providing for the registering of shares, empowering the company to make calls, subjecting defaulters in payment to actions for debt, and declaring that their shares should be forfeited, and providing a form for the legal transfer and memorial of shares. The plaintiff, a party to the subscribers' and parliamentary deeds, previous to the passing of the act, sold his scrip certificates, and having been, subsequently to the act passing, required to pay calls on his shares, filed a bill praying that the purchaser might be declared to have taken an equitable assignment of those shares, and might indemnify the plaintiff from all past and future liabilities from the time of the sale. It was held that the defendant, the purchaser, not having signed the subscribers' contract or parliamentary deeds, was in no way liable to the company: that there being no special contract between the parties, binding the purchaser to accept a

Whether
equity will
compel pur-
chaser of
scrip to in-
demnify
vendor.

8 & 9 Vict.
c 16.
Sect. 15.

[*111]

legal transfer of the shares, or to indemnify the plaintiff from his liabilities to the company, a court of equity would not raise an implied contract for those purposes, and the bill must be dismissed with costs. *(*Jackson v. Cocker*, 2 Railw. Cas. 368; 4 Beav. 89.) It was questioned in this case whether a special contract for the above purpose could have been enforced, or whether the same is not illegal and void. (See *Josephs v. Pebrer*, 3 B. & C. 639.)

A demurrer to a bill against the provisional committee of a projected railway company for the specific performance of an agreement to deliver to the plaintiff a certain number of scrip certificates was allowed, there being no allegation in the bill that the defendants had in their possession any scrip to deliver, but statements, from which the contrary might rather be inferred. It was questioned in this case whether such an agreement is a subject for specific performance. (*Columbine v. Chichester*, 2 Phill. C. C. 27.)

A railway company having power under separate acts of parliament to make and purchase certain branch railways in connexion with their main line, were for those purposes respectively authorized to raise the requisite capital by the creation of new stock. Having issued scrip certificates accordingly, but being about to apply the money subscribed in respect thereof to the prosecution of works on their original line, a holder of such scrip filed his bill on behalf of himself and all other the proprietors of such scrip against the company and its directors, praying an injunction to restrain the company and the directors from employing any money which had been subscribed in respect of the new stock towards the completion of the original line, or otherwise than in the completion of the works for which the money was subscribed: it was held, overruling demurrers of the company and directors, for want of equity and want of parties, first, that upon the construction of the acts of parliament creating the new stock, the capital raised by the scrip was not to be considered as identical with or part of the original capital of the company, and that the holders of the scrip had a clear equity to keep the company in the application of the money raised to those purposes for which it was

advanced. Secondly, that the plaintiff, as owner of such scrip, had a right in that charter to file his bill clear of any objection to which such bill might have been open, had he merely been a member of the company. Thirdly, that scrip is a marketable and transferable security, and that a holder of scrip by purchase is invested with all the rights of the original subscriber. (*Bagshaw v. Eastern Union Railway Company*, 2 Mac.&G. 339; 2 Hall & T. 201; 14 Jur. 491; 19 L. J. Chanc. 410; 6 Railw. C. 152.)

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c. 16
Sect. 15

In a case where a party had bought shares before the act of parliament for making the railway had passed from a person who had executed the subscribers' agreement, *Knight Bruce*, V. C., expressed an opinion, that if no other liability attached to the purchaser, by the mere force of law or of equity, or both, where a person has executed the subscribers' deed in respect of certain shares, and sold these shares and all his right thereto, it must be taken to have been part of the contract that he should be indemnified by *the purchaser from all liability in respect of calls of such shares. (*Jacques v. Chambers*, 4 Railw. C. 499.)

[*112]

In 1841 the plaintiff advanced to the defendant a sum of money upon the security of his promissory note, and an undertaking, when required, to transfer certain shares in a trading company as a further security, the defendant agreeing to indemnify the plaintiff against all calls or other payments which thereafter might be required in respect of the shares. In 1842, in pursuance of the undertaking, the shares were regularly transferred into the plaintiff's name, and such transfer was duly registered in the transfer-register of the company. In 1843 the mortgage debt was paid off, and the plaintiff, at the requisition of the defendant, applied to the directors of the company to transfer the shares into the name of the defendant, and took all the necessary steps on his part to obtain such transfer. The defendant concurred in the application, and signed the requisite notices to the company. The directors were bound under the terms of their settlement deed either to permit a transfer or to purchase the shares. Some delay in the transfer was occasioned by the act of the direc-

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c. 16.
Sect. 15

tors; and during the pendency of the negotiation, a creditor of the company, which in the meantime had become insolvent, recovered judgment to a large amount against the public officer of the company, and proceeded to make the judgment available against the plaintiff as a registered shareholder. Upon bill by the plaintiff against the defendant for an indemnity, &c.: it was held, that the defendant, after payment of the mortgage debt and the requisition to the plaintiff to procure a re-transfer, was equitable owner of the shares, and that the plaintiff was a trustee for the defendant of such shares, and as such entitled to an indemnity from his *cestui que trust* against the claims made in respect of the trust property. A trustee is not bound to wait till he has been compelled to make actual payments, or suffered express loss in respect of the trust property, but is entitled to come for relief as soon as he is under any existing liability. (*Peene v. Gillon*, Law J. Ch. 65, 1846; 5 Hare, 1.)

Equity will not restrain action for calls on the ground that fraud was practised on legislature.

The directors of the joint stock company, in order to comply with a standing order of the House Lords, as a means for procuring an act of incorporation, subscribed for a large additional number of shares in the undertaking, and signed a declaration that they held them in trust for the company, but did not pay the deposit on or register them. Subsequently, at a special general meeting of the company, it was resolved that the trust should be annulled and the shares transferred to the secretary, to be held by him at the disposal of the company; and this resolution was confirmed at a subsequent meeting of the directors. The directors made calls on the registered shares, and proceeded to enforce payment of them. A shareholder against whom an action for calls had been commenced filed a bill to restrain the further proceeding in the action. It was held on demurrer, that the directors were liable in respect of the deposit and all calls to be made *on such additional shares, and that the same must be considered as *bona fide* subscriptions; that they could not be considered as exonerated from such liability by the proceeding taken to annul the trust and transfer the shares: that the plaintiff, a

[*113]

registered shareholder, could not be relieved from his legal liability to pay calls on his shares, on the grounds that the additional subscriptions entered into were fictitious and fraudulent, for the colorable purposes of complying with the order of the House of Lords, and that the capital of the undertaking *bona fide* subscribed for was inadequate to carry out the project. (*Mangles v. Grand Collier Dock Co.*, 2 Railw. C. 359; see *Preston v. Grand Collier Dock Co.*, 2 Railw. C. 335, *post*.)

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c. 16
Sect. 15.

[113]

Four projectors of a public company obtained a charter, by which they, and all persons who might become subscribers, were incorporated. The capital was declared to be 20,000*l.* which was to be divided into 400 shares. Before any other subscribers had joined, the four projectors, of common assent, divided the 400 shares amongst themselves, accounting to the corporation (as was alleged) for 12,000*l.* and not 20,000*l.* They afterwards disposed of the shares. A bill being subsequently filed by the corporation against the projectors, impeaching the transaction, and to compel them to pay the full consideration, it was held, that though at the time they were the only persons interested in the company, yet it was not competent for them to take the shares without paying the full consideration. (*Society of Practical Knowledge v. Ibbott*, 2 Beav. 559.)

Fraud in obtaining shares.

If a contract be founded on fraudulent misrepresentations, such as would in a court of law be sufficient to support an action on the case, it may in a court of equity be rescinded. The fraud may consist in the misrepresentation of a fact material to the contract, where the truth of that is known to the one party and unknown to the other, and the misrepresentation is intentionally made with a view of procuring a more advantageous contract than the real facts, if truly stated, would have warranted. (*Lovell v. Hicks*, 2 Y. & Coll. 51.)

Fraudulent representations.

Where the director of a joint stock banking company circulated deceitful representations for the purpose of raising the value of the shares in the market, and benefiting himself by the sale of his own shares, it was held, that the court might give relief to a purchaser, although he should have taken a transfer of the shares, and have become one of the com-

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c. 16.
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pany. (*Stainbank v. Fernley*, 8 Jur. 262; 9 Sim. 556.) No other parties were necessary than the purchaser of the shares, the director who sold the shares, and the agent whose name was substituted for the real owner. (*Ib.*)

[*114]

A joint stock marine insurance company had declared dividends, which, as it afterwards appeared, were not warranted by the real condition of the company. The law agent of the company, who was also a member of it, when applied to for information, mentioned these dividends as proofs of the flourishing state of the company. The person to *whom he so mentioned them became afterwards a purchaser of shares: it was held, that he could not relieve himself from an action of calls nor rescind his contract on account of these representations: it was held, also, that the law agent of the company was not its agent to bind it in such matters; nor could he bind it as a partner, for a joint stock company is not, like an ordinary partnership, bound by the acts of any individual member of it. (*Burnes v. Pennell*, 2 H. L. Cas. 497; 13 Jur. 897.)

If the directors of a company agree to publish false statements of the affairs of the company, under such circumstances as show a fraudulent attempt to deceive they are not only civilly liable to those whom they have deceived and injured, but may be criminally prosecuted and punished. (*Ib.*)

In this case it was said, "if directors have made false representations for the purpose of fictitiously enhancing the price of shares for their own benefit, and a party has thereby been deceived, and induced to purchase shares greatly beyond their value, the transfer of the shares, although executed ought to be set aside." (*Ib.*)

"Dividends are supposed to be paid out of profits only, and when directors order a dividend to be paid where no such profits have been made, without expressly saying so, a gross fraud is practised; and the directors are not only civilly liable to those whom they have deceived and injured, but are guilty of a conspiracy, for which they are liable to be prosecuted and punished." (Per Lords *Campbell* and *Brougham*.) (*Ib.*)

XVI. No shareholder shall be entitled to transfer any share, after any call shall have been made in respect thereof,

until he shall have paid such call, nor until he shall have paid all calls for the time being due on every share held by him (x). 8 & 9 Vict.
c. 16.

Transfer not
to be made
until calls
paid.

Sect. 16.

(x) It has been a question in several cases when the call shall be considered as having been made. It was decided that the directors may fix the time, place and manner of payment of the call after the original resolution had been made, and by a distinct act. (*Sheffield, Ashton-under-Lyne, and Manchester Railw. Co. v. Woodcock*, 2 Railw. C. 530, 531; 7 Mees. & W. 588.)

Meaning of
the word
call in this
act.

It has been said that the word "call" is used in this act in two different senses. In one part it means the applications to the shareholders to pay and in another the amount to be paid, and that it is not a condition precedent that each party should have notice to pay the amount of his call at the same time and place. It follows that the resolution to make a call need not specify either the time or place for payment, but the directors must appoint a time and place, which must be notified to the shareholder by a notice, allowing him twenty-one days for the purpose of payment. The resolution is nothing more than a determination that thereafter "a call" shall be made, *that is that an application shall be made to each shareholder for a proportion of his share. And it is enough if the directors appoint a time and place, either by public advertisement (where such a mode is allowed by the private act) as in the case of *Great North of England Railw. Co. v. Biddulph* (2 Railw. C. 401; 7 Mees. & W. 243), or under this act by an individual notice to each shareholder. (*Newry and Enniskillen Railw. Co. v. Edmunds*, 5 Railw. C. 275; 2 Exch. 118.) In another case *Parke, B.*, said the word call is susceptible of three meanings. It may mean either the resolution itself, or the time of its notification, or the time when the money is payable. It may mean one of these three. (*Ambergate, &c. and Eastern Junction Railw. Co. v. Mitchell*, 6 Railw. C. 38-9.)

[*115]

It has been held, that a call on a railway company must be considered to be made at the time when the resolution for such call is notified to the shareholders in the company. In an action of assumpsit for the price of shares in a railway company, the declaration averred that the plaintiffs

When calls
are consid-
ered as made.

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Sect. 16.

were ready and willing to transfer the shares, which the plea denied. On the 15th October, 1845, the defendants bought from the plaintiffs, in the Manchester share market, 100 railway shares, to be paid for on the 31st October. On the 14th October a call had been made on the shares. By the custom of that market the deed of transfer was to be prepared by the vendor. On the 1st November the plaintiffs applied to the defendants for a name to be inserted in the deed as buyer; no name was furnished, and the defendants afterwards refused to accept the shares when tendered to them. The plaintiffs had not paid the calls on the shares. It was held, that the plaintiffs were entitled to recover the price of the shares, for they were in a condition to make a transfer of them by paying the calls on or before the 31st October, had the defendants furnished them with a name of the transferee. (*Shaw v. Rowley*, 16 M. & W. 810; 5 Railw. C. 47.)

It has since been decided by the Court of Queen's Bench that the resolution of a board of directors of a railway company that a call be made is the call within this section. The facts raising the question when a call is made within the meaning of this act were, that the directors passed the resolution by which the money was called for; on the following day the registered owner of shares executed a transfer to a purchaser, and offered to deliver it to the secretary, before either the vendor or the purchaser had notice of the resolution, and the secretary refused to receive the transfer unless the assignor would pay the money so called for, alleging that a call had been made, which allegation the assignor denied.

Patteson, J., observed, on considering this statute and the cases bearing on the subject, it appears that a call may mean either the resolution formally come to by those who have the power to determine, that those who are bound to contribute, i. e. the shareholders, shall pay a certain instalment; *or it may be that resolution, together with notice to the persons called on, of such resolution having been come to; or the combination of facts making the parties liable to an action for non-payment of the money called for; the last meaning not being applicable, the question lies between the

other constructions, and we have come to the conclusion that the first is correct, and that a call is made within the meaning of this section when the resolution above described has been come to. (*Reg v. Londonderry and Coleraine Railw. Co.*, 6 Railw. C. 3; 13 Q. B. 998.)

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c. 16.
Sect. 18.

The 16th section must be construed with reference to the 22d section, which empowers the company to make calls; and looking at that it seems clear that the making of a call and the notice of it, which must mean of its having been made, are two distinct things, and that the call must be made before notice of its having been made can be given. Now between the resolution and the notice no act intervenes, nor need anything precede the making of the resolution; if so, it follows necessarily that the resolution is the making of the call. The language of the 27th section tends to the same conclusion. (*Ex parte Tooke, Re Londonderry and Coleraine Railw. Co.*, 6 Railw. C. 3.)

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A shareholder in a company, subject to this act, on the 13th March executed a deed of transfer of his shares, and his broker lodged the deed of transfer with the secretary of the company for registration. The secretary refused to register it on the ground that a call made upon the shares before the 13th March, remained unpaid until the 14th April. Upon an application for a mandamus to the secretary to enter and register a memorial of the deed of transfer, it was held, that by this section the right to transfer shares was taken away until all the calls in respect thereof had been paid, and that the deed of transfer was therefore void. (*Hall v. Norfolk Estuary Co.*, 16 Jur. 149; 21 Law J. Q. B. 94.) It would have been a different question if the deed had been delivered as an escrow to take effect upon payment of the calls, but that question did not arise as between the vendor and purchaser; the deed was intended to be complete on the day of its execution. (*Ib.*)

An act of parliament incorporating a company provided that until a transfer of shares should be delivered to the secretary, the seller should remain liable for all future calls, and that no shareholder should be entitled to transfer any

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share until he should have paid all calls for the time being due on it. It also enabled the company to make calls on the shareholders, and if at the time appointed for payment of a call the holder of any share failed to pay it, to "sue such shareholder;" and a form of a declaration was given, stating that the defendant is a holder of one or more shares. It also provided, that on the trial it should be sufficient to prove that the defendant, at the time of *making the call*, was a holder of one or more shares. It was held, that a person who was a shareholder at the time when a call was made, and notice thereof given to him, but who had before the call [*117] *became payable transferred his shares and delivered the transfer to the secretary, was liable to be sued for the calls. (*North American Colonial Association of Ireland v. Bentley* 19 L. J. Q. B. 427.)

Closing of
transfer
books.

XVII. It shall be lawful for the directors to close the register of transfers for the prescribed period, or if no period be prescribed, then for a period not exceeding fourteen days previous to each ordinary meeting, and they may fix a day for the closing of the same, of which seven days notice shall be given by advertisement in some newspaper as after mentioned; and any transfer made during the time when the transfer books are so closed shall, as between the company and the party claiming under the same, but not otherwise, be considered as made subsequently to such ordinary meeting.

Transmis-
sion of shares
by other
means than
transfer to be
authenticated
by a declara-
tion.

XVIII. If the interest in any share have become transmitted in consequence of the death or bankruptcy or insolvency of any shareholder, or in consequence of the marriage of a female shareholder, or by any other lawful means than by a transfer according to the provisions of this or the special act, such transmission shall be authenticated by a declaration in writing as hereinafter mentioned, or in such other manner as the directors shall require; and every such declaration shall state the manner in which and the party to whom such share shall have been so transmitted, and shall be made and signed by some credible person before a justice, or before a master or master extraordinary of the High Court of Chancery; and such declaration shall be left with the secretary, and thereupon he shall enter the name

of the person entitled under such transmission in the register of shareholders; and for every such entry the company may demand any sum not exceeding the prescribed amount, and where no amount shall be prescribed, then not exceeding five shillings; and until such transmission has been so authenticated no person claiming by virtue of any such transmission shall be entitled to receive any share of the profits of the undertaking, nor to vote in respect of any such share as the holder thereof (y).

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c. 16.
Sect. 18.

(y) A mandamus will lie against a company of proprietors of a canal navigation, and their clerk, to compel them to make an entry of the probate of a deceased proprietor, and to register the name and place of abode of his executrix, as the proprietor of one share in the profits of the navigation belonging to the deceased at the time of his death. (*Rex v. Worcester Canal Co.*, 1 M. & R. 529.)

*Where shares are personal estate, and the railway or other work runs through different dioceses, it will be a matter for consideration in what court, probate of will or letters of administration are to be obtained. Where a canal was situate in both the provinces of York and Canterbury, but the office for transacting the business of it was in that of Canterbury, the court held that probate of the will of a shareholder in the province of Canterbury was sufficient. (*Smith v. Stafford*, 2 Wils. Ch. R. 166.) An act for making a navigable canal provided that the shares were to be deemed personal estate, and to be transferable as such. The canal passed through parishes in the diocese of Worcester, and other parishes in the diocese of Litchfield and Coventry. The transfers of shares in the canal were filed at the public office of the company in the latter diocese, where the dividends were also paid and books of account kept: it was held, that the right of a shareholder to a share of the profits, being personal profits, might be considered as locally situate in the diocese of Litchfield and Coventry for the purpose of probate, and that a probate granted by the consistorial court of that diocese was sufficient (*Ex parte Horne*, 7 B. & C. [*118] Probate of will in respect of shares.)

8 & 9 Vict. c. 16. 632; *S. C. nom. Rex v. Worcester Canal Co.*, 1 Man. & R. 529.)

Sect. 18.

Notice of
deposit or
equitable
mortgage of
shares.

The mortgagee of shares in a company must give notice of his incumbrance to the secretary, or his lien will be lost against a subsequent purchaser for valuable consideration without notice. A. and B. were directors in the W. M. Waterworks Company, in which no shareholder can act as a director without holding ten shares. A. and B. being intimate friends, the latter advanced to the former several sums, the last on the 23d July, 1829, on which day A. delivered to B. an order upon the secretary of the company to transfer A.'s ten shares into B.'s name. B. did not then make use of the order, and A. continued to act as director until his death, in May, 1832, insolvent, when a suit was instituted for the administration of his assets. B. then served the order of transfer on the secretary, and presented his petition in the suit, claiming an equitable lien on A.'s ten shares for the amount of his advances, with interest:—it was held, that these circumstances were not sufficient to show an intention to create a lien on the shares, and consequently B.'s claim was rejected. (*Cumming v. Prescott*, 2 Y. & Coll. 488.) In order to take shares out of the order and disposition of a bankrupt shareholder, where he has deposited or mortgaged them, notice thereof must be given to the company. In general, the notice thereof must be express; but it may be implied where all the parties are partners in the company, the shares of which are deposited, the transaction itself being sufficient notice. (*Ex parte Waitman* 1 Mont. & Ayr. 364. See *Duncan v. Chamberlayne*, 11 Sim. 123.)

Transfer of
shares by
bankruptcy.

If a bankrupt shall have any stock of any public company standing in his name in his own right, the Court of Bankruptcy may, by writing, order all persons whose act or consent is necessary to transfer the same into the name of the *assignees, and to pay all dividends upon the same to the official assignee. (12 & 13 Vict. c. 106, s. 128.)

[*119]

Stock of any public company standing in the name of any

bankrupt as a trustee, either alone or jointly, may be ordered by the Court of Chancery to be transferred by the assignees to new trustees. (*Ib.* s. 130. See *Ex parte Walker*, 19 Law J. Bank, 3.)

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c. 16.
Sect. 18.

If any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration or disposition as owner, the Court of Bankruptcy shall have power to order the same to be sold and disposed of for the benefit of the creditors, under the Bankruptcy, 12 & 13 Vict. c. 106, s. 125; 6 Geo. 4, c. 16, s. 72. (See *White v. Mullett*, 20 Law J. Exch. 201, 6 Exch. 713; *Ex parte Heslop re Atkinson*, 1 De. G. M. & G. 447.) [119]

Where an act forming a company prescribes certain forms in the transfer of such shares, unless such forms are strictly complied with, the shares remain in the order and disposition of the bankrupt proprietor, the ordinary mode of transfer not constituting an equitable mortgage; and though only expressly relating to transfers between third parties, yet it implicitly relates to cases where the company are the transferees. (*Re Dilworth, &c.* 1 Dea. & Ch. 411.) If a person hold shares for another, they will be treated as the property of the former; therefore where shares in an insurance company stood in the name of a bankrupt, who was on all occasions the only apparent owner, and had possession of the certificates of the shares, but the shares belonged to another person, in whose favor there existed a secret declaration of trust, the shares were considered in the order and disposition of the bankrupt. (*Ex parte Watkins*, 2 Mont. & A. 348; 1 Mont. & A. 689; see *Ex parte Harrison*, 3 Mont. & A. 506.) By the rules of a joint stock company only principals could become subscribers. The petitioner purchased forty shares in the name of the bankrupt, who verbally declared that he held them as a trustee for the petitioner, and the cer-

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tificates of the shares were kept in the possession of the petitioner; but no notice was given to the company of the trust, nor did the bankrupt sign a written declaration of trust until seven days before the fiat was issued: it was held, that the shares were in the order and disposition of the bankrupt as reputed owner, and passed to the assignees. (*Ex parte Orde*, 1 Deac. 166.) By the deed establishing a gas company, it was provided that all property purchased by the directors for the benefit of the company should be considered as personal estate: it was held, that shares in the company were mere personal estate, and the certificates being deposited by way of equitable mortgage, without transfer in the books of the company, remained "in the order and disposition" of the bankrupt, so as to pass to his assignees. (*Ex parte Valance re Lachman*, 1 Jur. 359; 3 Mont. & A. 224 C. R.)

[*120] Where a bankrupt pledges shares in a company which *belonged to his wife before marriage, notice must be given to the company before the act of bankruptcy, or they will be in the reputed ownership of the husband. (*Ex parte Spencer re Mitchell*, 3 Mont. & A. 697.)

A railway act prescribed a form of instrument for the transfer of shares, and provided that a memorial of the transfer should be entered in the company's books, and that until such memorial shall be made, the purchaser shall have no shares in the undertaking. A shareholder in the railway borrowed money on a deposit of the certificates of his shares with assignments executed by him, but with the name of the transferee left in blank, and the blanks were not filled up before the shareholder became bankrupt: it was held that the depository had a lien on the shares, and that the lien extended to sums paid by him in respect of calls. (*Ex parte Dobson*, 2 Mont. D. & De. G. 685.)

All contracts, dealings, and transactions by and with a bankrupt really and *bona fide* made and entered into before the date of the fiat, or the filing of the petition for adjudication, are deemed valid, notwithstanding any prior act, of

bankruptcy committed by the bankrupt, provided the person dealing with him had not at the time of the contract, & notice of any prior act of bankruptcy committed by him (12 & 13 Vict. c. 106, s. 133.) Under similar words in 2 & 3 Vict. c. 29, it was decided that notice of a deposit as a security for a debt, at the office of an insurance company after an act of bankruptcy, but before the fiat, by a party who had no notice of such act, was valid. (*Re Styant*, 1 Phil. C. C. 105.)

If any accredited agent of any body corporate or public company shall have had notice of any act of bankruptcy, such body corporate or company shall be deemed to have had such notice. (12 & 13 Vict. c. 106, s. 87.) As to what is such notice, see Shelford's Bankrupt Law, pp. 181, 182, and Suppl. 121.

It is questionable, where the same person is secretary to two insurance companies, whether his knowledge of a deposit of shares acquired by him as secretary to one of the companies amounts to notice to the other, so as to prevent the operation of the clause of reputed ownership. (*Ex parte Bignold re Theobald*, 3 Deac. 151.)

Shareholders in public companies are not liable to the bankrupt law in that character only. *Ex parte Bell*, 15 Ves. 357; 12 & 13 Vict. c. 106, s. 65; 6 Geo. 4, c. 16, s. 2.) But a shareholder may become a trader by executing the deed of settlement, and declaring himself a partner in the business regulated by that instrument. (*Ex parte Hall*, 3 Deac. 456; *Ex parte Brundrett*, 2 Deac. 219.)

The Court for the Relief of Insolvent Debtors may order all persons whose act or consent is thereto necessary to, transfer any stock of any public company, either in England Scotland or Ireland, standing in the insolvent's name, into the name of the assignee, and such persons are indemnified by the act 1 & 2 Vict. c. 110. s. 54. Shares in any public company, either in England, Scotland or Ireland, standing in the name of a petitioner for protection from process under the Insolvent Protection Act, 7 & 8 Vict. c. 96, may be

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Notice of act
of bank-
ruptcy to
company.

Transfer by
insolvency.

[*121]

8 & 9 Vict. transferred by the commissioner into the name of the assignees of the petitioner. (7 & 8 Vict c. 96, s. 15.)

c. 16.

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Liability of
estate of deceased share-
holder to
calls.

[121]

A testator was a registered owner of certain shares in the Eastern Counties Railway Company, in respect of which three calls were made in his lifetime, and seven after his death, but nothing was paid. In taking the account of his estate before the master, the company put in a claim for the amount of such calls and interest; and the master having allowed the claim as to the three calls made in the testator's lifetime, but disallowed it as to the seven calls made after his decease, exceptions were taken to the master's report by the company as to the claim disallowed, and by the executors as to the claim allowed: it was held, that the testator's estate was liable to pay as well the calls made before as those made after his decease, with interest at 5*l.* per cent. (*Fyler v. Fyler*, 2 Railw. C. 873; 3 Beav. 550; 6 Jur. 579.)

A testator subscribed for twenty shares of 100*l.* each in a projected railroad, and paid 5*l.* on each share, and covenanted to pay the remainder when called on. He bequeathed his personal estate to his widow, and devised certain of his real estates to a trustee, in trust to sell and pay all debts due from him on mortgage, or for the purchase of estate which he had contracted for, and all other just debts that should be due from him at his death. When he died the shares were at a premium, and no further instalment on them had been called for. Two years afterwards the act for making the railroad passed. It was held, that the testator's personal estate being exonerated from his debts, his widow was entitled to have the unpaid instalments paid out of the real estate. If the act of parliament had destroyed the covenant, yet the liability of the executrix and legatee as owner under the act would only be a substitution at law for the covenant, and her equity would remain the same. (*Blount v. Hipkins*, 7 Sim. 51.)

A testator at the time of his death was entitled to one hundred and twenty shares in the Great Western Railway Com-

pany. For thirty-eight of these he had been an original subscriber, and had subscribed the parliamentary contract, undertaking to pay the amount subscribed within ten years to the directors to be appointed by the railway act. The remaining eighty-two shares had been purchased by him as scrip. All the calls had not been paid on the shares at the time of the testator's death. After his death the company passed a resolution declaring that the proprietors of shares should be entitled to two new quarter shares in respect of each old share. By his will the testator had bequeathed thirty shares to A. and thirty shares to B., declaring that the legacies should not be deemed specific, so as to be capable of ademption. It was held, first, that the legatees were entitled to the income of the shares after the death of the testator.

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c. 16.
Sect. 14.

*That the legatees were entitled to a proportional number of new quarter shares. That the legatees, and not the executors, had the right of electing out of which class of shares their legacies should be delivered to them. (*Jacques v. Chambers*, 2 Coll. C. C. 435; 15 Law J. N. S. Ch. 225; 4 Railw. C. 205.) [*122]

It was decided that the testator's estate was liable to pay the calls on the original and on the purchased shares, and a sufficient sum to pay the unpaid calls was ordered to be placed to a separate account, and laid out, and the income in the meantime paid to the persons entitled to the general residue. (S. C. 4 Railw. C. 499.)

A testator, by codicil, gave all the shares he possessed in a certain railway, and all his right, title and interest therein, to his son and daughter equally. At the time of his death the testator had twenty-two £100 railway shares, on each of which calls, amounting to £70, had been paid, and the remaining sum of £30 had been advanced by the testator in his lifetime, under a power contained in the railway act, by which he was entitled to interest until the calls were made. It was held that the legatees were entitled to the shares and

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dividends, and also to the sums advanced and the interest. (*Tanner v. Tanner*, 5 Railw. C. 184; 11 Beav. 69.)

A bequest of all the testator's Great Western Railway shares and all other the railway shares of which he might be possessed at the time of his decease, was held to pass such Great Western shares as he had at the date of his will and which were afterwards, by a resolution of the company made under the authority of the Railway Act (7 Vict. c. ciii.), converted into consolidated stock, but not to the consolidated stock of the same company, purchased by the testator after the date of his will. (*Oakes v. Oakes*, 9 Hare, 666.)

Proof of
transmissions
by marriage,
will, &c.

XIX. If such transmission be by virtue of the marriage of a female shareholder, the said declaration shall contain a copy of the register of such marriage, or other particulars of the celebration thereof, and shall declare the identity of the wife with the holder of such share; and if such transmission have taken place by virtue of any testamentary instrument, or by intestacy, the probate of the will or the letters of administration, or an official extract therefrom, shall, together with such declaration, be produced to the secretary; and upon such production in either of the cases aforesaid the secretary shall make an entry of the declaration in the said register of transfers.

Company
not bound to
regard trusts.

XX. The company shall not be bound to see to the execution of any trust, whether express, implied, or constructive, to which any of the said shares may be subject; and the receipt of the party in whose name any such share shall stand in the books of the company, *or if it stands in the names of more parties than one, the receipt of one of the parties named in the register of shareholders, shall from time to time be a sufficient discharge to the company for any dividend or other sum of money payable in respect of such share, notwithstanding any trust to which such share may then be subject, and whether or not the company have had notice of such trusts; and the company shall not be bound to see to the application of the money paid upon such receipt. (z.)

[*123]

Equitable as-
signment of
shares in a co.

(z) Trust funds were invested in the purchase of transferable shares in a banking company, in the name of one of

the trustees, who executed a declaration of the trusts thereof (the rules of the company not allowing shares to stand in the name of joint owners or *cestui que trusts*). The trustee was also a proprietor of shares in his own right in the same company, and made various sales and purchases of shares therein. There was nothing to distinguish which were the individual shares held by the different proprietors the same being in the nature of a capital expressed by quantity. The trustee contracted to assign a certain number of shares to the banking company as a security for advances which they made to him; he afterwards became bankrupt. It was held, that the trustee must be presumed to have transferred or pledged such shares as belonged to himself, and so far as he had shares of his own, and not to have transferred or pledged the shares of his *cestui que trusts*. That therefore the *cestui que trusts* were entitled to so many of the shares standing in the name of the trustee at the time of his bankruptcy as could be presumed to be identical with the shares in which the trust funds were invested, from the fact that such a number of shares had always thenceforward stood in the name of the trustee. That having regard to the deed of association, the banking company had no lien founded on the general relation of partnership on the shares of a proprietor in respect of a debt owing by the proprietor to the company. That the right which the directors of the banking company might have under the deed of association of withholding their approval of the transfer of shares, cannot be exercised for the purpose of previously obtaining payment of a debt due to the bank from the proprietor whose shares are proposed to be transferred. That the equitable title of the *cestui que trusts* to the shares purchased with the trust funds was perfected without notice to the banking company, by the execution of the declaration of trust thereof. That the special contract by the proprietor to assign his shares to the banking company as a security for their advances, gave the bank a lien on the shares then standing in the name of the proprietor, of which he was the beneficial owner; and it seems that the

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same were not in his order and disposition at the time of the bankruptcy. (*Pinkett v. Wright*, 2 Hare, 120; 12 Law J. N. S. Ch. 119.)

**Payments of Calls.*

[*124]

And with respect to the payment of subscriptions, and the means of enforcing the payment of calls, be it enacted as follows :

Subscription
to be
paid when
called for:

XXI. The several persons who have subscribed any money towards the undertaking, or their legal representatives, respectively, shall pay the sums respectively so subscribed, or such portions thereof as shall from time to time be called for by the company, at such time and places as shall be appointed by the company; and with respect to the provisions herein or in the special act contained for enforcing the payment of calls, the word "shareholder" shall extend to and include the legal personal representatives of such shareholders (*a*).

(*a*) The special act of railway company provided that the capital should be divided into such number of shares, and of such amount respectively as would admit of the same being distributed amongst the several subscribers to the undertaking, and other persons as might become entitled to shares therein, consistently with the provisions thereafter contained, and provided that for the purpose of voting each sum of 25*l.* of the capital of the company, should be considered as representing one share, and that no one should be entitled to vote in respect of any less proportion of the capital, that three months should elapse between the making of successive calls. The capital of the company was in the first instance divided in shares of 25*l.* each, but these were afterwards reduced to 20*l.* each. On the 11th January the directors resolved that a call be made payable on the 15th February, and on the 8th May they resolved that another call be made payable on the 19th June: It was held, first, that the shares were valid, though less than 25*l.* each. Secondly, that the directors were empowered to make the calls. Thirdly, that a proper

interval had elapsed between the making of the two calls. 8 & 9 Vict. c. 16
(Ambergate, Nottingham and Boston and Eastern Junction Rail. Co. v. Mitchell, 6 Railw. Cas. 235 : 4 Exch. 540.) Sect. 21.

To a declaration for railway calls the defendant pleaded, Infant's.
 that at the time when he first became the holder of the shares, and at the time of his making the contracts by force of which the debts, causes of action, and liabilities in the declaration mentioned accrued to the plaintiff, and were incurred by the defendant, and at the time of his making and entering into the contract by force of which the plaintiff's claim to be entitled by law to make the call upon the defendant as in the declaration alleged, the defendant was an infant within the age of twenty-one years. Replication, that the defendant at the time when he first became the holder of the shares, and at the time of his making the contracts *in the plea mentioned, was of the full age of twenty-one years. It appeared at the trial that the defendant was the purchaser of the shares in question whilst he was an infant, and that after he was of full age a call was made: it was held, that the term "contract" meant the contract by which the defendant became a shareholder; and not the obligation to pay the calls under this section, and consequently the plea was proved by evidence of his infancy at the time of the transfer to him of the shares. [*125]
(Birkenhead, &c. Railway Company v. Pilcher, 5 Exch. 24.)

But it was questioned whether, under such a construction of the word "contract," the plea was an answer to the action. (*Ib.*) (1)

(1) In an action by a corporation to recover for stock subscribed for, a plea that a person had refused to take certain stock for which he had subscribed, and that another person had agreed to take such stock, and that the Commissioners had counted such stock to this latter person, is insufficient. The signature of the first subscriber should have been erased, and that of the other substituted, or something should be done, so as to hold the latter liable. A subscriber for stock cannot rescind his contract at pleasure. *Ryder v. Alton & Sangamon Rail Road Company, 13 Illinois, 516.* A subscriber cannot rescind his contract at pleasure.

Under the charter, the city of Alton had the right to become a

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subscriber to the capital stock of the Alton and Sangamon Rail Road Company, and give her proxy to whom she pleased. *Id.*

See *ante*, p. 87 n, *post*, pp. 136—138.

Power to
make calls.

XXII. It shall be lawful for the company from time to time to make such calls of money upon the respective shareholders, in respect of the amount of capital respectively subscribed or owing by them, as they shall think fit, provided that twenty-one days notice at the least be given of each call, and that no call exceed the prescribed amount, if any, and that successive calls be not made at less than the prescribed interval, if any, and that the aggregate amount of calls made in any one year do not exceed the prescribed amount if any; and every shareholder shall be liable to pay the amount of the calls so made, in respect of the shares held by him, to the persons and at the times and places from time to time appointed by the company (*b*).

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Call payable
by instal-
ments.

(*b*) It was decided that under this act a call on shares could not be made payable by instalments. *Ambergate Railw. Co. v. Coulthard*, 14 Jur. 625; 19 L. J. Exch. 311; 6 Railw. Ca. 218; 5 Exch. 459; 20 Law J., Exch. 234.

The directors of a railway company made a call of 1*l.* 5*s.* per share, ordering at the same time the sum of 15*s.* per share, part thereof to be paid on the 28th of February, and the remaining 1*l.* on the 7th May, and between the two latter days brought an action to recover the instalments of 15*s.*: it was held, that they were not entitled to recover this amount, being part of a call. (*Id.*) But this case has been overruled, and it has been since held, that there is no legal objection to a call being made payable by instalments. (*London and North Western Railw. Co. v. M^r Michael*, 6 Railw. C. 494; 6 Exch. 273; *Birkenhead, &c. Railw. Co. v. Webster*, 6 Railw. C. 498.) (1)

(1) In New Hampshire the capital stock of a corporation was fixed at fifty thousand dollars, divided into five hundred shares of one hundred dollars each; but only one hundred and thirty-eight shares had been subscribed for. Held, that no assessments for the general purposes of the corporation could legally be made, until all the shares were taken. (*Littleton Manufacturing Co. v. Barber*, 14 New Hampshire, 543.

The declaration on the deed of settlement of a railway company stated that the defendant was a shareholder, that a resolution for a call was duly made, and that notice thereof was duly given to the defendant, who had not paid the call. In order to prove the service of a notice of call the plaintiff *proved that it was the duty of C. to fill up the printed notices and direct them to the shareholders; that on the day of the call he had received instructions to send out such notices, and putting them into a basket ready to be posted, and that at that time he had a list in his hand. It was proved that all the letters in the basket were posted. C. was dead at the time of the trial, but a list containing the name of the defendant was produced in his handwriting with an indorsement by him, "Letters sent out:" it was held, that this list, so indorsed, was admissible, as it might reasonably be inferred that it was a contemporaneous entry. (*Eastern Union Railw. Co. v. Symonds*, 19 L. J., Exch. 287; 6 Railw. C. 578. See *Re Jennings*, 1 Ir. Eq. R. N. S. 236.)

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Proof of notice of calls.

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An action for a call upon shares will not lie against a party who has transferred his shares after the call had been made, and before it was payable, and after the company had entered a memorial of the transfer. (*Aylesbury Railw. Co. v. Mount*, 2 Dowl. N. S. 143; 5 Scott, N. R. 127; 2 Railw. C. 679; 4 Man. & G. 651.) In another case it was held that the purchaser of shares was not liable to calls which were made before, but not payable until after the deed had been registered, the act providing that until a memorial of the transfer had been made the vendor was to remain liable for future calls. (*Aylesbury Railw. Co. v. Thompson*, 2 Railw. C. 668. See *ante*, p. 108 n.) (1)

Actions for calls.

(1) An allottee of shares in a projected railway company paid on them; he also executed the subscribers' agreement, a deed under seal; but he did so on the faith of a letter written by the provisional directors before the execution of the deed, by which they undertook to return the whole deposit if the act should not pass. The deed was in the usual form, between all the shareholders with trustees, to perform the covenants, and contained a covenant to indemnify

Liability for calls.

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c. 16.
Sect. 22.

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Declaration
for calls by
railway
company.

the provisional directors whether the act should or should not pass :
Held, that the deed, being a contract by each shareholder with all the others ; its effect could not be destroyed in favor of any shareholder, by a contract between him and a certain number of shareholders ; consequently the allottee, who had signed it, was not protected by the letter of the provisional directors against a call. (*Dover & Deal Railway Company, Ex parte Francis Mowatt*, 19 *Eng. Law & Equity* 127.)

By the Aylesbury Railway Act (6 Will. 4, c. lxxxvii. s. 95), the company are empowered to sue *subscribers* for calls. The proprietors were enabled to sell and dispose of their shares subject to the rules and conditions therein mentioned, and provides that "on every sale, the deed or conveyance being executed by the seller and purchaser, shall be kept by the company, who shall enter into some book to be kept for that purpose a memorial of such transfer and sale, and indorse the entry of such memorial on the said deed of sale or transfer ; and that, until such memorial shall have been made and entered as before directed, the seller thereof shall have been made and entered as before directed, the seller thereof shall remain and be held liable for all future calls, and the purchaser shall have no part or share in the profits of the said undertaking, nor any interest in respect of such share paid to him, nor any vote in respect thereof as a proprietor of the said undertaking. And sect. 102 enacts, "that no person or corporation shall sell or transfer any share which he or they shall possess, in the said undertaking, upon which any call shall have been made after the day appointed for the payment of the same, unless at the time of such sale or transfer he or they shall have paid the full sum of money which shall have been called for in respect of such share. In an action for a call the declaration stated that the defendant, being the proprietor of divers shares in the railway, was indebted to the said company for a call of 5*l.* upon each of his shares. The defendant pleaded, that true it was that on the day mentioned in the declaration he was the proprietor of the shares therein mentioned, but that, after the

making of the call and before the same was payable he *duly transferred all his shares in the undertaking to one Thompson, that Thompson accepted the transfer, and that the conveyance was delivered to and entered and memorialized by the company before the call was payable, whereby the defendant ceased to be the proprietor and owner of the shares, and then ceased to be liable to the said call. It was held, reversing the judgment of the court below, that the declaration was sufficient upon general demurrer, and that the plea was bad, as being a mere argumentative denial that the defendant was ever indebted. (*Aylesbury Railw. Co. v. Mount*, 8 Scott, N. R. 586. See *Aylesbury Railw. Co. v. Mount*, 5 Scott, N. R. 127 ; 2 Dowl. N. S. 143 ; 4 Man. & G. 651.)

An act of parliament creating a railway company empowered the company to raise a capital and gave power to the directors for the time being to carry on the affairs of the company, and order the parties who had subscribed to pay the sums subscribed when called on by the directors, and also empowered the latter from time to time to make calls to a certain amount on the subscribers to and proprietors of shares in the company ; notice of such calls to be inserted in certain local newspapers ; the notice to state the time, place, and manner in which the calls were to be made. In an action of debt for the amount of calls, it appeared at the trial that the defendant had originally subscribed to the company, but was never registered as a proprietor ; that the resolution of the directors, making the call, neither stated when, where or to whom the money was to be paid ; all of which, however, were stated in the notice inserted in the newspapers ; and no objection having been made at the trial that the notice had not been inserted under the sanction of the directors : it was held, first, that it was unnecessary to show by evidence that the resolution of the directors specified the time and place of payment. (*Great North of England Railw. Co. v. Bid-dulph*, 7 Mee. & W. 243 ; 5 Jur. 221 ; 2 Railw. C. 401.)

A company were empowered by act of parliament to carry on certain works, and the committee were authorized to make calls

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c. 16.
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Calls made
at once ir-
regular.

for money upon proprietors, not exceeding 10*l.* per share, from time to time, as they should find necessary, so that no calls should be made at the intervals of less than two months from each other. None of the powers of the act were to be put in force till 33,500*l.* were subscribed. The committee began the works before that sum was subscribed, and made a single order, calling on the proprietors for several payments of 10*l.* each, to be made at intervals of two months. A subsequent act recited that the capital of 33,500*l.* had not been subscribed, that the company had proceeded in the works, incurred debts, &c., and that a certain sum was due from defaulters in the payment of calls. It provided for carrying on the works and for making further calls, and it enacted that the powers, &c. of the former act (except where expressly altered) should remain vested in the company, though the 33,500*l.* had not been subscribed. In *an action by the company against one of the committee for money due on some of the calls made as above mentioned, others of which he had paid, it was held, that the calls being made all at one time were irregular; that they were not ratified by the mention of them in the second statute, as it could not be presumed, in the absence of any expression to such effect, that the legislature, when passing that act, was apprised of their having been improperly made; and that the defendant was not estopped by having joined in making the calls, or by his payment of part of them, from disputing their validity; for that, the calls being against the law, no person ought to have been misled into a compliance with them by the defendant's conduct or admissions. (*Stratford and Moreton Railw. Co. v. Stratton*, 2 B. & Ad. 518. See *Smith v. Goldsworthy*, 4 Q. B. R. 430; 3 Gale & D. 448; 7 Jur. 389; Law J. 1843, Q. B. 192.)

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The Sheffield and Manchester Railway Act (7 Will. 4, c. xxi.), by sect. 115, empowered the directors from time to time to make such calls from the proprietors on their respective shares, as they from time to time should find necessary, so that no call should exceed 10*l.* on each share and that there should be an interval of three cal-

ender months between each successive call, and twenty-one days' notice should be given of every such call by advertisement in the local newspapers; and the proprietors were then required to pay the calls on their shares to such persons, at such time, at such place, and in such manner as the directors should from time to time direct or appoint. The directors made a resolution for a call, specifying therein the amount of the call and the day of payment, but not the place where or the person to whom the payment was to be made; but a notice of that call, subsequently inserted in the local newspapers according to the directions of the act, specified all those matters. In an action for the amount of such call against a party who was a proprietor at the date of the resolution of the notice and of the date appointed for payment, it not also appearing that there was any change in the directors during the interval, it was held, that the call was properly made. (*Sheffield, Ashton-under-Lyne and Manchester Railw. Co. v. Woodcock*, 7 Mee. & W. 574; 2 Railw. C. 522.) By another resolution, made on the 13th of March, the directors resolved that a call of 5*l.* should be made on the 30th of March instant, to be paid on the first of May; it was held, that the call was not invalid, because the resolution was not prospective. (*Ib.*)

In an action for calls the defendant applied to set aside proceedings on the ground that the action had been brought without authority, as the company had ceased to exist. It was held, that as the cause had been set down for trial, and the defendant had known the facts for a long time, the application was at all events too late; and that as the persons authorizing the action had for some time acted as directors, the validity of their appointment could not be questioned on such an application. It was held, also, that after plea it *was to be presumed that the attorney had been appointed under the seal of the company; and the court refused to allow a plea raising that question to be added at that stage of the proceedings. (*Thames Haven Dock and Railw. Co. v. Hall*, 3 Rail. C. 441.)

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Interest to be
paid on calls
unpaid.

[129]

Power to
allow interest
on payment
of subscrip-
tions before
call.

XXIII. If, before or on the day appointed for payment, any shareholder do not pay the amount of any call to which he is liable, then such shareholder shall be liable to pay interest for the same at the rate allowed by law from the day appointed for the payment thereof to the time of the actual payment.

XXIV. It shall be lawful for the company, if they think fit, to receive from any of the shareholders willing to advance the same all or any part of the monies due upon their respective shares beyond the sums actually called for; and upon the principal monies so paid in advance, or so much thereof as from time to time shall exceed the amount of the calls then made upon the shares in respect of which such advance shall be made, the company may pay interest at such rate, not exceeding the legal rate of interest for the time being, as the shareholder paying such sum in advance and the company shall agree upon (r).

No interest
to be paid
on calls un-
der railway
bills.

(r) The standing orders require that a clause shall be inserted in every railway bill, prohibiting the payment of any interest or dividend in respect of calls under such bill (except the interest by way of discount on subscriptions prepaid agreeably to this section), out of any capital which they have been authorized to raise, either by means of calls or of any power of borrowing. (*Standing Orders*, 1852—3 H. C. 135; H. L. 189, s. 6.)

Enforcement
of calls by
action.

XXV. If at the time appointed by the company for the payment of any call any shareholder fail to pay the amount of such call, it shall be lawful for the company to sue such shareholder for the amount thereof, in any court of law or equity having competent jurisdiction, and to recover the same, with lawful interest, from the day on which such call was payable (s).

Recovery
of interest.

(s) A railway act authorized the company of proprietors to recover in an action of debt what would be due for calls, including interest on such calls. It was admitted that interest was recoverable under a count for calls (the damages laid being sufficient to recover the amount) without a count for interest. (*London and Brighton Railw. Co. v. Fair-*

clough, 3 Scott, N. R. 68; 2 Man. & G. 674; 2 Railw. C. 544.) Where an act incorporating a company prescribed the form of declaration in an action for calls, and the necessary proof to support it, and that thereupon the company *should be entitled to recover what shall appear due, including interest in respect of such calls, it was held unnecessary to insert a count for interest, which might be added by the jury to the debt claimed for the calls, for where a statute gives an action of debt, it gives that which is ancillary to and the consequence of such an action, which is damages for the detention of the debt. (*Southampton Dock Co. v. Richards*, 2 Railw. C. 215; 1 Scott, N. R. 219; 1 Man. & G. 448.)

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Where a defendant had suffered judgment by default, in an action for calls on shares in a railway company, on which interest is also claimed pursuant to the provisions of the act of parliament, the court will not grant a rule to compute, but will direct a writ of inquiry to be executed. (*Cheltenham and Great Western Union Railw. Co. v. Fry*, 7 Dowl. 616.)

A. advanced money to B. on the security of railway shares. They were transferred into the name of C. to secure A., and subject thereto for B. C. died insolvent: it was held, that A. was not liable, at the suit of the company, for the arrears of calls on the shares. (*Newry, &c. Railway Company v. Moss*, 14 Beav. 64; 15 Jur. 437; 20 L. J. Chanc., 633.) (1)

(1) In an action for calls, a plea, that the action was on contracts without specialty, and that the causes of action did not accrue within six years. *Held*, issuable; but afterwards, *held* bad on demurrer.

Limitation of
action.

Quere, whether a plea that the shares were forfeited, and that the company had received sufficient thereupon to pay the calls, is issuable. (*Cork & Brandon Railway Company, v. Goode*, 24 Eng. Law & Equity 245.)

XXVI. In any action or suit to be brought by the company against any shareholder to recover any money due for any call, it shall not be necessary to set forth the special matter,

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in actions for
calls.

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but it shall be sufficient for the company to declare that the defendant is the holder of one share or more in the company (stating the number of shares), and is indebted to the company in the sum of money to which the calls in arrear shall amount in respect of one call or more upon one share or more (stating the number and amount of each of such calls), whereby an action hath accrued to the company by virtue of this and the special act (*t*).

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(*t*) On this form of declaration, the allegation that the defendant is the holder of shares, means that he was the holder at the time the call was made. (*Belfast and County Down Railw. Co. v. Strange*, 1 Exch, 739; 5 Railw. Cas. 548.)

Therefore, where a declaration in an action for calls stated that the defendant at the time of the commencement of the suit, was and still is the holder of the shares, and at the time of the commencement of the suit, was and still is indebted to the plaintiffs for calls on those shares, &c., whereby and by force of this act and the special act an action accrued, &c., and the defendant pleaded, that at the time of the commencement of the suit he was not the holder of the said shares and also that he was not the holder of the shares at the time the calls were made; the court on motion, struck out the latter plea, and amended the declaration and former plea by striking out the words, "at the commencement of the suit." (*Ib.*)

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*The declaration in an action of debt for calls stated, that the defendant, on the 27th November, 1848, and from thence hitherto hath been and still is the holder of forty shares in the said company, and then and at the time of the commencement of the suit was and still is indebted to the company in 300*l.* for calls, whereby an action hath accrued by virtue of this act and of two special railway acts, to demand of the defendant 300*l.*: it was held that the declaration was not bad on special demurrer, by reason of the averment as to the time of the holding of the shares and the debt to the company,

or the statement as to the two special acts. (*Midland Great Western Railw. Co. of Ireland v. Evans*, 4 Exch. 649; 19 L. J., Exch. 118; 6 Railw. C. 205.) 8 & 9 VICT.
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In debt for railway calls, the declaration stated, "that at the time of the making of the calls the defendant was and still is the holder of divers shares in the company, and before the commencement of this suit was and still is indebted to the company, &c.:" it was held, on special demurrer, that the declaration was good, although it did not follow the form given by this section of the act, all except what is required by the statute, being only surplusage. (*East Lancashire Railw. Co. v. Croxton*, 1 Prac. Rep. 298; 19 L. J., Exch. 313; 5 Exch. 287; 6 Railw. C. 214.) [131]

The following declaration seems to have been considered bad on special demurrer for not following the form given by this section. A declaration for calls by a railway company stated, for that whereas the defendant is the holder of divers shares, to wit, &c. in the said company, and is indebted to the said company in a large sum of money, to wit, &c. in respect of two separate calls, the first being a call of, &c., and the second being a call of &c., upon each of the said shares theretofore respectively, to wit, on, &c., and on &c., duly made by the company, whereby an action hath accrued to the company, by virtue of this act of parliament, and also of the special act, to demand and have of and from the defendant the said sum of, &c., parcel of the sum above demanded, yet the defendant hath not paid the sum above demanded, or any part thereof. (*Newport Railw. Co., v. Hawes*, 3 Exch. 476.)

The form of declaration given by this section of the act is not applicable to an action against the executors of a shareholder for calls made during his lifetime. (*Birkenhead &c., Junction Railw. Co. v. Cotesworth*, 1 Prac. Rep. 244; 14 Jur. 354; 19 L. J. Exch. 240; 6 Railw. C. 211; 5 Exch. 226.)

On an action by a company for calls, under the 26th and 27th section of this act, the defendant under a traverse of Defence in
action for
calls.

8 & 9 VICT. his, being a shareholder in the company, may not only dis-
 c 16 pute that he is such *de facto*, but may show that he is not a
 Sect. 26. shareholder *de jure*, so as to be entitled to a share in the
 profits of the undertaking. (*Shropshire Railw. Co. v. Anderson*, 13 Jur. 175; 18 L. J. Exch. 232; 3 Exch. 401;
 6 Railw. C. 56; 6 D. & L. 482.)

[*132] Therefore, in such a case, where the special act enacted
 *that the provisions of this general act, as to the distribution
 of the capital into the shares and the enforcing the payment
 for calls, should be incorporated with it, and that the com-
 pany might create new shares in the manner to be agreed
 upon at a general meeting of the company, the defendant
 was allowed to plead, first never indebted; secondly, that
 he was not a shareholder; and, thirdly, a traverse of the
 calls having been made; but was not allowed to plead that
 there had been no meeting of the company before the shares
 had been created, nor that the shares were not agreed to be
 created at the meeting of the company. (*Id.*) (1)

(1) In an action for calls, although it appears that due notice was
 given of the calls, and that the defendant's name was on the sealed
 Register of the Company, prescribed by the Companies Clauses
 Consolidation Act, 8 & 9 Vict. c. 13; it was held that the evidence
 that the defendant was a shareholder in the company was but *prima*
facie, and that any facts, which show that the company had no right
 to put the defendant's name on the Register, will rebut the *prima*
facie inference. The case of *The Waterford &c., Railway Compa-*
ny, v. Pidcock, 18 Eng. Law & Equity 517, is as follows:—

“ In an action of calls by railway company the plaintiffs proved
 due notice of the calls, and that the defendant's name was on the
 sealed register of the company prescribed by the Companies Clauses
 Consolidation Act, 8 & 3 Vict. c. 16. In answer to this case
 the defendant put in evidence his application for shares and the let-
 ter of allotment, by the former of which it appeared that he ap-
 plied for 100 shares in the company, undertaking to pay the depos-
 it and sign the necessary deeds. The letter acquainted him that
 fifty shares had been allotted to him; requiring him to pay a cer-
 tain deposit on them before a certain day; that scrip certificates

would be delivered to him in exchange for that letter and the bank-
er's receipt for the deposit after the execution of the parliamentary contract and subscribers' agreement, which would lie for signature at a certain place after a certain time ; and that the shares allotted would be forfeited if the deposit were not paid within the specified time, and the parliamentary contract and subscribers' agreement signed before a certain other day. The defendant had never done any other act with regard to the company :—

“*Held*, that this evidence rebutted the *prima facie* inference from the register that the defendant was a shareholder in the company.

“Per PALLOCK, C. B., the action would be maintainable if the defendant had paid the whole sum subscribed for, though he had not executed the parliamentary contract and subscribers' agreement.

“*Semble*, that the defendant was entitled to abandon his contract and forfeit his deposit.

“*Semble*, also that the company might accept the subscription of the defendant to the parliamentary contract and subscribers' agreement after the time specified in the letter of allotment.”

In an action for railway calls, the declaration stated that the defendants were and still are the holders of divers shares and, being such holders, were at the commencement of the suit, and still are, indebted to the company in the amount of the calls. The defendants pleaded *nunquam indebitatus* only: It was held, no admission that the defendants were shareholders, for never indebted, put in issue all the material allegations in the declaration, and it was a material allegation that the defendant was a shareholder at the time of the call being made. (*Birkenhead, &c. Junction Railw. Co. v. Brownrigg*, 4 Exch. 426 ; 19 Law. J. Exch. 27 ; 6 Railw. C. 47.)

In an action by a railway company for calls, a declaration framed on this section alleged that the defendant “is the holder of ten shares, and is indebted to the commissioners in 100*l.* in respect of a call of 10*l.* upon each of the said shares :” it was held good on special demurrer, by the Court of Exchequer, although it was objected that the declaration did not allege that the defendant was the holder of such shares

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at the time the calls were made. (*Wilson v. Birkenhead, Lancashire and Cheshire Junction Railw. Co.* (in error), 20 L. J., Exch. 306; 6 Railw. C. 771.)

General and
special de-
murrer.

Before the Common Law Procedure Act, 1852, a demurrer was either general or special. A general demurrer excepts to the sufficiency in general terms, without showing specifically the nature of the defendant's objection to the declaration. A special demurrer added to this a specification of the particular ground of objection. A general demurrer is sufficient, where the objection is on matter of *substance*. A special demurrer was necessary where the objection turned on matter of *form* only; that is where, notwithstanding such objection, enough appeared to entitle the opposite party to judgment, as far as related to the merits of the cause. (*Stephen on pleading*, 159.) No pleading shall be deemed insufficient for any defect which could heretofore only be objected to by special demurrer. (15 & 16 Vict. c. 76, s. 51.) If any pleading be so framed as to prejudice, embarrass or delay the fair trial of the action, the opposite party may apply to the court or judge to strike out or amend such pleading, and the court or any judge shall make such order respecting the same, and also respecting the costs of the application, as such court or judge shall see fit. (*Ib.* s. 52.)

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*A plea to set off, in respect of calls on shares in a joint stock company, must either state the facts specially, or strictly pursue the form given by this section. Therefore a plea founded on this statute, but omitting the words, "whereby an action hath accrued," &c., is bad on special demurrer. (*Moore v. Metropolitan Sewage Manure Co.*, 3 Exch. Rep. 333; 6 D. & L. 496; 18 Law J. Exch. 164.)

Plea of set
off.

Several pleas
in actions for
calls.

To an action for calls, in which the declaration contained allegations that a board of directors met to make a call, that another board met to determine how notice of a call should be given, and a third meeting met to determine when the call should be paid, the defendant having obtained leave to plead (*inter alia*) that the persons alleged as having made

the call did not constitute a board of directors, pleaded that the said persons in the said declaration mentioned as constituting a board of directors of the said company did not constitute such board *modo et forma*, the plaintiff signed judgment thereon, which judgment was set aside by a judge's order: it was held, that judgement was rightly signed, and the court set the order aside, but without the costs of such application allowing the defendant to plead *de novo* on terms. (*Wills v. Robinson*, 5 Exch. 302.)

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In an action for calls by a railway company, the court allowed the defendant to plead, first, never indebted; second, traverse of the defendant being the holder, and that the calls were fraudulently made by the plaintiffs for certain fraudulent and illegal purposes (specifying them); eighth, that, after the accruing of the causes of action, it was agreed between the plaintiffs and the defendant and others that the calls should be rescinded, and that the defendants should not be called upon to pay the calls, and that such agreement was accepted in satisfaction of such causes of action; twelfth, that the capital required by the company's act had not been *bona fide* subscribed for, but that a greater portion of such subscription was fraudulently obtained by the plaintiffs; that there was no subscription to the amount required by the act at the times of making the calls; and that the plaintiffs had no power to make calls until the subscriptions had been made (*Waterford, Wexford, Wicklow and Dublin Railw. Co., v. Logan*, 14 Jur. 346; 19 L. J., Q. B. 259.)

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But disallowed the following pleas:—Third, that the defendant was put on the register of shareholders of the plaintiffs' company by fraud of the plaintiffs; fourth that defendant is one of the persons mentioned in plaintiffs' act as having subscribed to the undertaking, by virtue of which subscription he became holder of the shares, and that he was induced to so subscribe by fraud of the plaintiffs and others [or, by fraud of the promoters of the company under whom the plaintiffs claimed]; seventh, that before the passing of the plaintiffs' act,

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and before any register of shareholders was formed, and before making the calls, the defendant, being an original subscriber, sold his scrip to a person unknown, and delivered the scrip to the purchaser; that the vendee applied to the plaintiffs to be *registered as a shareholder, and that the company and the vendee agreed to register him, and that the vendee should be the holder of the said shares, and be registered in respect thereof; that the company afterwards registered the defendant's name for the said shares against his will, and against the will of the vendee; and that the defendant never was the holder of the said shares, except as aforesaid; ninth, that the plaintiffs act of parliament was obtained by fraud of the plaintiffs and others; thirteenth no notice of the calls. (*Ib.*)

Pleas to the
jurisdiction.

By a railway act, 1 Vict. c. xcv., s. 75, in case any owner should neglect or refuse to pay the calls upon it, the company might sue for and recover the same in any of her majesty's courts of record in Dublin; and section 77 gives a concise form of declaration that the defendant is indebted for calls, &c., without setting forth the special matter. To a declaration under the latter section, in an action for calls brought in England, the defendant pleaded "that this court ought not to take further cognizance of the action, because it is enacted by the said statute (sect. 75) that in an action for calls it shall be lawful for the said company to sue for and recover the same in any of her majesty's courts of record in Dublin, and that he was therefore liable to be sued in those courts, *and not elsewhere*, and that this defendant is ready to verify; therefore he prays judgment whether this court can or will take further cognizance of the action aforesaid." It was held on demurrer to this plea, that although in form a plea to the jurisdiction, yet as it disclosed matters in bar of the action, it might be made use of for that purpose, and that therefore the declaration was open to the objection of being bad at common law, and that the plaintiffs, not having followed the remedy given by the act, could not avail themselves of the concise form of declaring given by

the act. (*Dundalk Western Railw. Co., v. Tapster*, 2 Railw. C. 586; 1 Q. B. R. 667.)

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By the terms of a railway act the directors were entitled to recover for calls in arrear, upon proving that the defendant was a proprietor, and that notice of the calls was given according to the act unless the defendant should prove that he had paid the full amount of his subscription. The defendant having pleaded to an action for calls that he was not indebted, and was not a proprietor, the court refused to allow the defendant to plead, first, that due notice of the calls was not given pursuant to the act; secondly, that no time, place or person was appointed for the payment of the calls; thirdly, that the calls were made for other purposes than those mentioned in the act; fourthly, that the company had made deviations not warranted by the act, and that the calls were made for the purpose of these deviations; fifthly, that at the time of making the calls there were not 36,000 shares in the company as provided by the act. (*London and Brighton Railw. Co., v. Wilson*, 6 Bing. N. C. 135; 8 Scott, 347; 8 Dowl. B. C. 4; 1 Railw. C. 530. See *Eastern Counties Railw. Co. v. Cooke*, 2 Railw. C. 250; 4 Jur. 1185.)

Pleas in an-
swer to ac-
tion for calls:

*The court refused to rescind a judge's order which gave leave to the defendant to plead (*inter alia*) that before the calls were made the directors declared the shares forfeited, but did not go on to say that the declaration of forfeiture had been confirmed by the company. (*Eastern Counties Railw. Co. v. Cooke*, 2 Railw. C. 250; 4 Jur. 1185, Q. B.) Where a judge's order has been obtained to plead several pleas, and the order is made a rule of court, if the plaintiff wishes to get rid of such pleas, he should move to rescind the judge's order. A rule to strike out the pleas was discharged, because not drawn up "on reading the declaration or on affidavit that the pleas were identical." The court will not allow an amendment in such cases. (*South Eastern Railw. Co. v. Spratt*, 8 Dowl. P. C. 493.)

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In an action for calls in arrear, under a railway act, by which the directors were entitled to recover, upon proving that the defendant was a proprietor, and that notice of the calls had been given according to the act, unless the defendant should prove that he had paid the full amount of his subscription, the only pleas which will be allowed are, first, *nunquam indebitatus*; secondly, that the defendant was not a proprietor; thirdly, that the directors have exercised their power of declaring the shares forfeited, and have taken the steps thereupon prescribed by the act. And the court struck out the following pleas: that at the meetings of the directors at which the calls were made, there were not present, in pursuance of the act, four directors who had paid their calls upon their shares; that no place, nor time, nor mode of payment was mentioned in the calls; that the calls were for other purposes than those mentioned in the act; that the calls were not made upon all the shareholders; that the calls were not duly made. (*South Eastern Railw. Co. v. Hebblewaite*, 4 Jur. 1184; 4 P. & D. 246; 2 Railw. C. 250.)

A railway act, in addition to the usual general clause giving a short form of declaration in an action for calls against proprietors of shares for the time being, enacted (sect. 129), that the parties who had subscribed, or should thereafter subscribe to the undertaking, should pay such sum as should from time to time be called for; and that in case of default, it should be lawful for the company to sue for and recover the same in any court of law or equity. The defendant had subscribed the parliamentary contract, but was not registered as a proprietor in the share register book or otherwise. By various resolutions of the directors, calls were from time to time made on the proprietors of the company. It was held, that the defendant was liable to a special action against him as a subscriber under sect. 129 for such calls, there being no distinction between subscribers and proprietors. (*West London Railw. Co. v. Barnard*, Law J.

1844, Q. B. 68; 3 Q. B. R. 873.) It seems also that he might, for the same reason, have been sued under the general clause as a proprietor. (*Ib.*)

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*In *Aylesbury Railw. Co. v. Mount*, (4 Man. & G. 651; [*136] Law J. 1842, C. P. 258; 2 Railw. C. 679), the substantial question was, whether an action for a call can be maintained against a proprietor, who does not appear to have been an original subscriber, and who has transferred his shares, after an instalment of the subscription has been called for by the directors, and before the time of payment of it; *Tindal*, C. J., observed, "The statutes respecting railways appear to treat a shareholder (at least one who takes by transfer, and is not an original subscriber) as identified with his share, and as having nothing to do with the company, either with respect to rights or liabilities, before he becomes, or after he ceases to be, a shareholder; the express provisions of the act, giving remedies by action, by forfeiture, and by withholding dividends against those who held the shares at the time the call was payable, and the absence of any express provision continuing the liability of a shareholder, of whose transfer a memorial is entered, show that the act considers the debt as not arising until the day appointed for payment. The duty of a shareholder who takes by transfer, to pay a call, is the creature of the act; the act requires the payment to be made at the time appointed by the directors; at the time, and not before, the duty arises, and it is a duty which, by the terms of the act, is cast on the owners for the time being."

By the Edinburgh and Leith Railway Act (6 & 7 Will. 4. c. cxxi. s. 50), in actions by the company for calls, it shall be sufficient to allege that the defendant, being a proprietor of so many shares, is indebted to the company in such sum of money upon such shares belonging to him, whereby a right of action hath accrued to the company by virtue of that act, without setting out the special matter; and in such

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action it shall only be necessary to prove that the defendant was a proprietor at the time of making the calls, that they were in fact made, and that notice thereof was given according to the act; to a declaration in the general form given by that clause, the defendant pleaded pleas denying notice of the calls pursuant to the act, and concluded with a verification; it was held that the allegation of notice, that being a point necessary to be proved in order to entitle the plaintiff to recover, must be taken to be impliedly contained in the declaration, by reference to the act of parliament; and therefore that the pleas, being in denial of a matter necessarily implied in the declaration, ought to have concluded to the contrary, and not with a verification, and were on that ground bad on special demurrer. (*Edinburgh, Leith and Newhaven Railw. Co. v. Hebblewhite*, 6 Mee. & W. W. 707; 8 Dowl. P. C. 802; 2 Railw. C. 237.) It seems that in such case the plea of not indebted would sufficiently put in issue all the matters required by the act to be proved in support of the action. (*Ib.* See *ante*, p. 132.)

How far Infants are liable to calls.

[*137] This statute does not deprive infants of the protection which the law gives them against improvident bargains, but under it an infant subscriber or shareholder is not absolutely bound, but is in the same situation as an infant acquiring real *estate or any other permanent interest, he is not deprived of the right which the law gives every infant, of waiving and disagreeing to a purchase which he has made, and if he waives it, the estate acquired by the purchase is at an end, and with it his liability to pay calls, though the avoidance may not have taken place till the call was due. (Per *Parke*, B., 6 Railw. C. 624 citing *Bac. Abr. Infancy and Age* (I.) 8; *Co. Litt.* 2 b.) Although a shareholder in a railway company is not made a holder of real estate, for all the real estates are vested in the body corporate, yet the shareholder acquires on being registered a vested interest of a permanent character in all the profits arising from the land and other effects of the company, and when registered may be deemed a pur-

chaser in possession of such interest, and is placed in a position analogous to that of a purchaser of real estate. 8 & 9 VICT. c. 27.

Where, therefore, there is nothing but the simple fact of infancy pleaded in an action for calls against a purchaser who has been registered and thereby become a shareholder in a subject of a permanent character, the interest continuing to be vested in the infant and the consequent obligation to pay the simple plea of infancy is insufficient. (6 Railw. C. 625.) Sect. 26.

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In an action under this section for calls on shares in a railway company, which the defendant has obtained by original agreement with the company, and where his name has been entered in their register of shares as proprietor thereof, it is no answer to plead that the defendant was an infant at the time of the agreement for the shares, and of entering his name on the register and of making the calls, that he never ratified or confirmed the purchase, and that the bargain was a disadvantageous one to him. (*North Western Railway Company v. M'Michael, Birkenhead, Lancashire and Cheshire Junction Railway Company v. Pilcher*, 5 Exch. 121; 15 Jur. 132; 20 L.J., Exch. 97; 6 Railw. C. 564, 618, 625; *ante* p. 124.)

Therefore, where, to a declaration for railway calls, the defendant pleaded, that at the time when he first became the holder of the shares, and at the time of his making the contracts by force of which the debts, causes of action and liabilities in the declaration mentioned accrued to the plaintiffs and were incurred by the defendant, and at the time of his making and entering into the contracts by force of which the plaintiffs claim to be entitled by law to make the call upon the defendant, as in the declaration alleged, the defendant was an infant within the age of twenty-one years; to which the plaintiffs replied that the defendant, at the time when he first became the holder of the shares, and at the time of his making the contracts in the plea mentioned, was of the full age of twenty-one years, upon which issue was joined and a verdict entered for the defendant:—it was held, that the plaintiffs were entitled to judgment non obstante veredicto. (*Id.*)

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Where an estate vests in an infant, the burthen upon it continues to be obligatory until a waiver or disagreement by the infant takes place, which if made after full age, avoids the estate altogether, and reverts it in the party from *whom the infant purchased; if made within age, it suspends it only because such disagreement may be again recalled when the infant attains his majority. (6 Railw. C. 626.)

Where the defendant pleaded that the company, in pursuance of the defendant's application, granted the shares to him as the original holder thereof, and entered his name in the register of shareholders as the proprietor thereof, and so the defendant became and still is the original holder of the shares by contract with the company, and not otherwise; that when the shares were granted to him, and his name entered as aforesaid, and also at the respective times of making the calls, the defendant was an infant; that he never ratified or confirmed the said application, grant, entry and proprietorship, but the same have hitherto remained wholly unratified and unconfirmed; that he has not at any time derived any profit, benefit, or advantage whatsoever from the shares or by reason of his being the proprietor thereof; and such proprietorship has always been wholly unprofitable and useless to the defendant; it was held, on general demurrer, that the plea was bad for want of an averment that the defendant had repudiated the contract, or at least that he continued a minor. (*North Western Railw. Co. v. M'Michael*, 5 Exch. 114; 15 Jur. 132; 20 L. J. Exch. 97; 6 Railw. C. 618.)

To an action for calls the defendant pleaded, that at the time of making the calls he was an infant, and also that at the time of his becoming the holder of the shares in respect of which the calls were made he was an infant: it was held, on special demurrer, that the pleas were bad, as they did not show that the defendant was a shareholder by contract, and had avoided it. (*Leeds and Thirsk Railw. Co. v. Fearnley*, 7 D. & L. 68, 4 Exch. 26, 5 Railw. C. 644.)

It was also held, that the appearance by attorney is an act done in court anterior and collateral to the pleadings, and not

involving any issue on the pleadings, and that therefore it cannot be considered as equivalent to an averment in the plea that the defendant was of full age before the commencement of the suit, or at the time of the plea pleaded. (*Id.*)

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To debt for calls against a shareholder, the defendant pleaded that he became the holder of the share by subscription, and that at the time of his subscribing for the shares, and of the making of the calls, he was an infant, and while he was an infant, he disaffirmed the contract and subscription, of which the plaintiffs then had notice; and that he then gave notice to the plaintiffs that he held the shares at their disposal: it was held, a good defence to the action. (*Newry & Enniskillen Railw. Co. v. Combe*, 5 Railw. Cas. 633; 3 Exch. 565. See *ante* pp. 87, 124.)

Shares were sold to a minor, and were duly transferred to him, on the declaration of the vendor that he was of age.—The father of the minor, by a deed reciting that he had purchased on behalf of the minor, covenanted that his son would on coming of age, execute the deed, and would pay all calls, &c., and that he (the father) would indemnify the *company against all costs by reason of the son being a minor: it was held that the father was a “contributory.” *Ex parte Reaveley*, 12 Jur. 1065, 1 De G. & S. 550. See *Stikeman v. Dawson*, 4 Railw. C. 585.)

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XXVII. On the trial or hearing of such action or suit it shall be sufficient to prove that the defendant at the time of making such call was a holder of one share or more in the undertaking, and that such call was in fact made, and such notice thereof given as is directed by this or the special act; and it shall not be necessary to prove the appointment of the directors who made such call, nor any other matter whatsoever; and thereupon the company shall be entitled to recover what shall be due upon such call, with interest thereon, unless it shall appear either that any such call exceeds the prescribed amount, or that due notice of such call was not given, or that the prescribed interval between two successive calls had not elapsed, or that calls amounting to more than the sum prescribed for the total amount of calls in one year had been made within that period (*u*).

Matter to be
proved in ac-
tion for calls.

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(u) Where a clause in a railway act empowering directors of a railway to make calls, required twenty-one days' notice to be given of every call by advertisement, and directed that money so called for should be paid to such persons, and at such times and places as in such notice should be appointed and the act directed that at the trial of any action for a call it should only be necessary to prove that the defendant was a proprietor of such share or shares in the undertaking as such action is brought in respect of, or some one such share, and that such notice was given as directed by the act of such call having been made, without proving the appointment of the directors or any other matter, it is sufficient to state the place and time of payment in the advertisement, without noticing either in the resolution for making the call, such statement being made with the previous or subsequent assent of the directors, which assent will be presumed. (*London and Brighton Railw. Co. v. Fairclough*, 3 Scott, N. R. 68 ; 2 Man. & G. 674 ; 2 Railw. C. 544. See *ante*, pp. 125, 126.)

By a railway act (6 Will. 4, c. lxxxvii. s. 101,) it was provided, that proprietors might transfer their shares on certain conditions ; that the deed of transfer should be kept by the company, who were to cause a memorial of such transfer to be entered in a book to be kept for that purpose. Section 96 gave power to make calls on giving twenty-one days' notice, and provided that if any owner or proprietor *for the time being* should not pay his calls, he should be liable to pay interest ; and sect. 98 provided, that on the trial it should be only necessary to prove that the defendant, *at the time of making such calls*, was a proprietor. An action was brought

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by the company against the defendant for two calls, *notice of the first having been given 6th March, payable 9th April, and of the second 23d June, payable 28th July. A deed of transfer of the shares from the original holder to the defendant was produced, and the transfer book of the company, containing a memorial of the transfer, both dated 7th April but there was no other evidence of the time when the entry was made ; it was held that the transfer book was admissible

and was reasonable evidence to show the entry was made when it bore date ; and that the defendant not having been a proprietor till 7th April, after the day when the first call was *made* (not *payable*,) was not liable to the first, but only to the second call. *Aylesbury Railw. Co. v. Thompson*, 2, Railw. C. 668.)

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XXVIII. The production of the register of shareholders shall be *prima facie* evidence of such defendant being a shareholder, and of the number and amount of his shares (v). Proof of proprietorship.

(v) The register is not conclusive evidence, because it is open to a party on the register to show that his name was inserted therein without his consent. (6 Railw. C. 282.)

In an action for calls on shares in a company within this act, the register of shareholders required by this statute to be kept, is admissible in evidence without proof that the seal was affixed to it at a general meeting of the company.—(*North Western Railw. Co. v. M'Daniel*, 14, Jur. 987, Exch. See *Waterford, &c. Railw. Co. v. Wolsely*, 1 Ir. L. R. N. S. 444.)

The only register of shareholders which is made *prima facie* evidence under this section of a party being a shareholder in the company, is the register duly prepared and sealed, under the 9th section. (*Birkenhead, &c., Railw. Co. v. Brownrigg*, 6 Rail. Cas. 47 ; 4 Exch. 426 ; 19 L. J., Exch. 27.) Therefore, when such sealed register described the holders of shares to be Brownrigg and others, trustees, it was held to be no evidence against a co-trustee.

In an action for calls, it was found, upon a special verdict, that before the calls were made, the defendant was registered as a shareholder, and that he knew he was registered, and that he adopted the registry, and acted as a shareholder : it was held, that upon such finding, the defendant was *prima facie* liable for calls. (*West Cornwall Railw. Co. v. Mowatt*, 15, Jur. 101 ; 15 Q. B. 521.)

It was held also, that a future finding, that, before the registration, the defendant had entered into an agreement

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with the directors of the company, which agreement was ratified by the half yearly meeting of proprietors, that he should pay at once 4*l.* per share for certain 20*l.* shares, which were the shares upon which the calls were made, and that as soon as the sum of 15*l.* per share should have been paid upon the said shares, and the company should be in a position legally to do so, they should deliver to the defendant mortgage debentures of the company to the value of 5*l.* per share upon the said shares, and that the registration was *made in consequence of the agreement, and without any other authority, did not relieve him from such *prima facie* liability, whether the stipulation to return 5*l.* per share was or was not illegal by virtue of the stat. 7 & 8 Vict. c. 85, s. 19, *ante*, p. 51, or invalid by reason of its being beyond the competency of a meeting of proprietors to adopt it. (*Ib.*)

But it was held, that the stipulation to deliver such debentures, as soon as the company should be in such a position legally to do so, was not illegal. (*Ib.*)

Forgery of
transfer of
railway
shares.

On an indictment for forging and uttering a transfer of shares in a railway company, the register of shareholders, bearing the seal of the company and kept according to the 9th section of this act (*ante*, p. 87), is evidence to show that an individual is a shareholder, without further proof of authentication; and in order to prove that such individual is liable to be defrauded by the forging and uttering of a transfer of the shares, it is not necessary to give further proof of his title to the shares. (*Reg. v. Nash*, 2 C. C. R. 493; 16 Jur. 554; 21 Law J. M. C. 147.)

Books of
company
when evi-
dence.

A railway act provided that the company should enter in a book the names of the persons who should then be or should from time to time become entitled to shares, the number of shares to which the persons respectively should be entitled and the amount of subscriptions paid thereon; and that on any action for calls, the book should be *prima facie* evidence of the defendant being a proprietor, and of the number and amount of his shares. The register book produced at a trial did not contain the amount of subscrip-

tions paid on the respective shares : it was held nevertheless that it was *prima facie* evidence of the defendant being the proprietor of the shares. (*Birmingham, Bristol and Thames Junction Railw. Co., v. Locke*, 1 Q. B. R. 256; 2 Railw. C. 867).

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The London and Brighton Railway Act (1 Vict. c. cxix. s. 140) enacts, that the company shall enter the names and additions of the shareholders in a book, and cause the common seal to be affixed thereto : and sect. 142, that they shall enter in a book the names and places of abode of persons who from time to time shall be entitled to any share in the undertaking; and sect. 148 provides, that in an action for calls it shall only be necessary to prove that the defendant was a proprietor of the shares, and that notice was given of the calls, and that the production of the books above mentioned shall be *prima facie* evidence that the defendant is a proprietor. It was held that the production of the book required by the 140th section, containing the defendant's name as proprietor of the shares, was alone not sufficient *prima facie* evidence of his being a proprietor; and that proof of the entry of the memorial of a transfer deed, under sect. 155, is not necessary to enable the company to recover, the provisions of that section being intended only for the security of the company. (*London and Brighton Railw. Co. v. Fairclough*, 2 Railw. C. 544; 3 Scott, N. R. 68; 2 Man. & G. 674; 2 Railw. C. 544.)

*By the Cheltenham and Great Western Union Railway Act (Will. 4, c. lxxvii,) it is enacted that in an action for calls on shares in that company, the book of shares, under the seal of the company, should be *prima facie* evidence that a party is proprietor of shares. It appeared that a call was made in October, 1836, and that the book of shares, which contained the name of the defendant as a shareholder, was made up before the end of September, 1836, from claims sent in by different parties, but that the seal was not affixed to it till November, 1836. It was held, that this book was no evidence that the defendant was a proprietor of shares at

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8 & 9 Vict. the time of the call in October, 1836. (*Cheltenham Railw.*
 c. 16. *Co. v. Price*, 9 Car. & P. 55.)
 Sect. 28.

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By the Southampton Dock Act (6 Will. 4, c. xxix.) it is provided (sect. 84), that in an action for calls, in order to prove that the defendant was a proprietor of such shares in the undertaking as alleged, the production of the book in which the secretary of the company is by this act directed (sect. 89,) to enter and keep a list of the names and additions and places of abode of the several proprietors of shares, with the number of shares they are respectively entitled to hold, shall be *prima facie* evidence that such defendant is a proprietor, and of the number or amount of his shares, therein. Section 89 requires the company from time to time to cause the names, additions and places of abode of the persons from time to time entitled to shares, with the number of their shares and amount of subscriptions paid thereon, and the proper number by which every such share shall be distinguished, to be entered in a book to be kept by the secretary. It was held, that the provision as to the making the entries is only directory, and that an omission or irregularity in the entries in the book relating to other shareholders does not render the book inadmissible against the defendant, as being the book kept under the act, and that it is not necessary that the entries should be made by the secretary's hand. (*Southampton Dock Co. v. Rickards*, 2 Railw. C. 215; 1 Scott. N. R. 219; 1 Man. & G. 448.)

By the London Grand Junction Railway Act (6 & 7 Will. 4, c. civ.), the company are required (sect. 145) "to cause the names and additions of the several persons who shall then be or shall thereafter become entitled to shares in the said undertaking, with the number of shares they are respectively entitled to, and the amount of the subscriptions paid thereon, and the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the said company, and after such entry made, to cause their common seal to be affixed thereto." By sect. 147 it is enacted, "that the company shall, in some

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proper book to be provided by them for that purpose, enter and keep a true account of the places of abode of the several proprietors of the undertaking and of the several persons who shall from time to time become proprietors thereof or be entitled to shares therein." And sect. 152 enacts, "that in any action to be brought by the company against any proprietor* for the time being of any share in the said undertaking, to recover any money due and payable for or in respect of any call, in order to prove that the defendant, at the time of making such call, was a proprietor of such share as alleged, the production of the book in which the said company is by this act directed to enter and keep the names and additions of the several proprietors from time to time of shares in the undertaking, with the number of shares they are respectively entitled to, and of the places of abode of the several proprietors of the said undertaking, and of the several persons who shall from time to time become proprietors thereof or be entitled to shares therein, shall be *prima facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein." It was held, that the book thus made evidence by sect. 152, is the book which the company are required by sect. 145 to keep; and that a book kept by the company, containing the names and additions of all the persons whom they supposed to be the persons entitled to shares, together with the number of those shares (though not in all cases the amount of subscriptions paid thereon), and the proper number by which each share was distinguished, and sealed from time to time with the common seal of the company, was a book substantially kept in compliance with the act, and admissible in evidence though it contained names of persons not entitled, and omitted some of the persons who were entitled to shares, and some entries to which there was no seal affixed. It was held also, that the *prima facie* evidence of the defendant being a proprietor, supplied by the production of this book, was not rebutted by proof that another person was the original subscriber to the parliamentary contract in respect of

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the shares in question, and had not conveyed them to the defendant by deed, as required by sect. 155; and therefore that the defendant who having before the passing of the act become entitled by the then well understood mode of transfer (in the form of scrip), was afterwards registered as a shareholder, was liable to pay calls on such shares. (*London Grand Junction Railw. Co. v. Freeman*, 2 Railw. C. 468; 2 Scott, N R. 705; 2 Man. & G. 607; *ante*, pp. 93, 94.) (1)

Of Railroad
subscriptions
and suits to
enforce pay-
ment for
calls, &c.

(1) It has been held in Ohio, that an agreement attempting to secure to any stockholders, the privilege of paying up subscriptions in store-pay or otherwise, except in money, will be treated as a fraud upon other stockholders, and payment in money will be enforced. (*Henry v. Vermilion & Ashland Rail Road Company*, 17 Ohio 187.)

A bill in Chancery in the form of a creditor's bill will lie against the stockholders of an incorporated Company, to subject unpaid subscriptions of stock, and the stockholders may be proceeded against in this way, though they omitted to pay at the time of subscription, the five per cent. required by the charter. (*Ib.*)

So in *Mann v. Cooke*, 20 Connecticut 179, it was held that a Rail Road Corporation could not receive a subscription, under a private agreement at less than the par value of the stock, as it would thus take from the available means of the company and operate as a fraud upon the other stockholders and the creditors of the Company; and that a receiver stood in the place of creditors, and that such an agreement was equally unavailable against him.

If a Rail Road Company accept an alteration of their charter, which is *fundamental* and not simply *auxiliary* to the original purpose of the Corporation, and which would not be binding upon the corporation, except by their consent, its effect will be to absolve previous subscribers from their subscriptions, unless assented to by them; thus where a Rail Road Company sued a subscriber for installments which he agreed to pay, and it appeared that after the installments became due and before suit brought, the company had procured an alteration of their charter by adding a power to purchase steamboats, &c.; the subscriber was held to have been absolved from his subscription, not having as-

sented to such alteration. *Hartford & New Haven Rail Road. 8 & 9 VICT. c 16.*
Company v. Croswell, 5 Hill 383.)

See also *Stevens v. Rutland & Burlington Rail Road Company* Vol. 1 of the American Law Register p. 154, and the cases there cited.

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Of Railroad subscriptions and suits to enforce payment for calls, &c.

It has often been held that to enable a Corporation to sustain an action at law to recover a subscription to the capital stock of a corporation where a remedy is given by a forfeiture of the stock, there must be an express promise, and that a personal obligation cannot be erected by any by-law or vote of the company. Thus in Maine it was held, that a corporation cannot in an action at law recover the amount of the shares or the assessments on them, unless the holder has expressly agreed to pay them, or unless by the charter or some other statute, a personal obligation to pay is imposed upon the holder. (*Kennebec & Portland Rail Road Company, v. Kendall, 31 Maine, 1 Red 470.*)

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An agreement in writing to subscribe for a specified number of shares is not, it was held, an express promise to pay for them. (*Ib.*)

A personal obligation to pay for shares or assessments cannot be created by any by-law or vote of the corporation. (*Ib.*)

A statute authority to "make and collect such assessments on the shares" as may be deemed expedient in such manner as should be prescribed in their by-laws, does not confer, nor does any statute of the state confer on the corporation the power to create a personal liability on the stockholder to pay for his shares. (*Ib.*)

A by-law made under such authority, and providing that, "if the shares of any delinquent stockholder, shall not sell for a sum sufficient to pay his assessments, with interest and charges for the sale, he shall be held liable for any such deficiency," will not sustain an action at law for the deficiency. (*Ib.*)

Many of the other States have made like decisions. See *Andover & Medford Turnpike Company v. Gould, 6 Mass. 40*; *New Bedford & Bridgewater Turnpike Company v. Adams, 8 Mass. 138*; *Taunton &c. Turnpike Company v. Whiting, 10 Mass. 327*; *Franklin Glass Company v. White, 14 Mass 286*; *Franklin Glass Company v. Alexander, 2 New Hampshire 380*; and the inclination of the courts in Vermont seems to be the same way.

While in other cases, it has been held that a subscription for shares of the capital stock of a company, created a debt, which

8 & 9 Vict. c. 16. may be enforced by any appropriate common law, or equitable remedy, even though there is a provision for the forfeiture of the stock for the non-payment of the calls. See *Hartford & New Haven Rail Road Company v. Kennedy*, 12 Conn. 499; *The same v. Boorman*, 12 Conn. 530; *Mann v. Cooke*, 20 Conn. 187, *Troy Turnpike & Rail Road Company v. McChesney*, 21 Wend. 297; *Herkimer M. & H Company v. Small*, 2 Hill 127, 129; *Sagory v. Dubois*, 3 Sand. Ch. 466; *Mann v. Currie*, 2 Barbour 294; *Mann v. Pratt*, 2 Sanford Ch. 273. *Beene v. Cahawba & Marion R. R. Company*, 3 Alabama 660.

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A promise to a subscription to the capital stock of a Rail Road Corporation "to take five shares of the stock subject to the conditions, requirements, liabilities and benefits of the act of incorporation" is equivalent to an *express promise* to pay for the stock, as it shall be called for by the Directors. (*Northern Rail Road Company v. Miller*, 10 Barbour 260.)

Where the act of incorporation contemplates some act to be done as organization, before the instalments of stock can be required to be paid; such act must be done before the corporation can maintain an action for the instalments; the subscription being made prior to the time of organization. (*Carlisle v. Cahawba and Marion Rail Road Company*, 4 Alabama 270.)

An act incorporating a Rail Road Company, provided that the Capital Stock should not exceed two thousand shares; that no assessments should be laid on the shares to a greater amount in the whole than one hundred dollars, that the number of the shares should be determined from time to time by the Directors and that as soon as 250 shares should be subscribed, the company should proceed to construct and open the Roads. C. subscribed for five shares, and the Directors after more than 250 shares were subscribed, voted to close the Books of subscriptions of the capital stock, and passed no other vote fixing the number of shares. C. paid six assessments on his shares but neglected to pay the seventh, and the Treasurer of the Company, in pursuance of the Revised Statutes of Massachusetts, (chap. 39, sec. 53,) sold said shares at auction, but not for a sufficient sum to pay said assessment, and the company brought an action against C. to recover the deficiency.

Held, that the vote of the Directors to close the subscription

books for shares on a given day was in effect a vote fixing the number of shares at the number then subscribed for, as ascertained by said books, and lawfully fixed the number for the time being ; that C.'s shares were legally liable to assessment, and that he was liable for the deficiency sued for. (*Lexington & West Cambridge Rail Road Company, v. Chandler*, 13 Met. 311.)

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So in New York where a corporation is authorized to make calls upon their stockholders for their subscriptions, as the directors shall see fit, under a penalty of a forfeiture of the shares, and the previous payments thereon, in the case of non-payment they may sue for the amount of the calls, or may declare a forfeiture of the stock (*Herkimer M. & H. Company v. Small*, 21 Wind. 273 ; *Troy Turnpike & Railroad Company v. McCheney*, 21 Wend. 296.)

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If after suit brought, the shares are declared forfeited, this is no bar to a further maintenance of the suit, if the stock forfeited is not at least equal to the amount due on the shares, but the value of the stock will go in mitigation of damages. (*Id*) See also *Mann v. Cooke*, 20 Conn. 178. (*Selina & Tennessee Rail Road Company v. Tipton*, 5 Alabama 787.)

A subscriber to Rail Road Stock will be held liable to the payment of his subscription, although the Legislature may have authorized, and the directors of the company may have adopted a change of route from that first fixed by law, provided the change does not make an improvement of a different charter, and his interest is not materially affected by the alteration. (*Banet v. Alton & Sangamon Rail Road Company*, 13 Illinois, 504.)

Where the power to require payment from the stockholders is vested in a board of directors, an action will not lie to recover instalments, unless all the prerequisites of the charter have been complied with (*Id*)

Where a statute prescribes the terms on which shares in the stock of a Rail Road company may be sold for the payment of assessments, and the shareholder held to pay the balance of the assessments, if any shall remain ; held that the terms prescribed are conditions precedent to the sale, and unless strictly pursued, the sale is illegal and the shareholder not chargeable. (*Portland, Saco &c., Rail Road Company v. Graham*, 11 Met. 1.) Hence where a statute incorporating a Rail Road Company, provided that if any

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subscriber or stockholder should neglect to pay any assessment on his shares, the directors might order the Treasurer to sell the shares at public auction after giving a certain notice, to the highest bidder, and that the same should be transferred to the purchaser, and that such delinquent subscriber or stockholder should be held accountable to the company for the balance, if his shares should sell for less than the assessments due thereon, with the interest and cost of sale. G., a subscriber, neglected to pay his assessment, and his shares were advertised for sale by an auctioneer without any reference in the advertisement to the order of the Treasurer, and were bid off by T. at public auction, at a sum less than the amount of the assessment. T. did not take the shares, the sale at auction was abandoned, and the shares were sold to others at a private sale for the sum bid therefor by T. In an action brought by the company against G. to recover the balance due on the assessments; held, that the prerequisites to a sale were conditions precedent, and if not complied with the sale was illegal. (*Id.*)

A subscriber for stock cannot rescind his contract by forfeiting the payment made thereon, the right of forfeiture belongs exclusively to the corporation, to be used at its election; or the corporation may resort to the common Law remedy, on the express promise to pay the amount of the subscription. (*Klein v. Alton and Sangamon Rail Road Company*, 13 *Illinois*, 514.) But when stock is partially paid for and transferred by the stockholder *bona fide*, to another person and he is accepted by the corporation as the holder of the stock, this is a discharge of the original stockholder, and he cannot afterwards be pursued by a creditor. (*Allen v. Montgomery Rail Road Company*, 11 *Alabama*, 437.)

Where a charter requires 5 per cent upon stock to be paid at the time of subscription, if the subscriber does not pay it, but a judgment is afterwards rendered against him therefor, and he afterwards pays it, he cannot object to a suit brought against him for other assessments, that he did not pay the 5 per cent. in cash, when he subscribed. (*Hall v. Selma & Tennessee Rail Road Company*, 6 *Alabama*, 741.)

So a party subscribing for stock, if he pays the required instalment before the Books are closed, will be held to pay the residue, although he did not pay on each share at the time of taking the stock. (*Klein v. Alton & Sangamon Rail Road Company*, 13 *Illinois*, 514.)

So a subscription to stock which is created by a charter requiring a certain sum to be paid at the time of subscription, will not be invalidated, if the party subscribing does not actually pay the requisite sum, provided he is a commissioner to receive the money and procure the stock to be taken. (*Ryder v. Alton & Sangamon Rail Road Company*, 13 Illinois, 516)

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By the 4th Sec. of the charter of the Vermont Central Rail Road Company, certain persons named were constituted commissioners for receiving subscriptions to the capital stock of the company, and it was enacted as follows: "and every person at the time of subscribing, shall pay to the commissioners \$5 on each share for which he may subscribe and each subscriber shall be a member of said company;" and it was further enacted, that when 1000 shares should be subscribed, the commissioners might issue notice for the stockholders to meet and elect directors.

The defendant after some other shares had been subscribed but less than 1000 shares, subscribed himself for 50 shares of the capital stock, and instead of paying \$5 on each share to the commissioners at the time of subscribing; he gave them his promissory note for that amount (being \$250,) payable to the commissioners of the Vermont Central Rail Road Company, on demand for value received. This note was received from the commissioners by the corporation upon their organization. Held that the note was given upon sufficient consideration; and that it was a valid note in the hands of the Corporation. (*Vt. Central Rail Road Company, v. Clages*, 21 Vermont 30.) [143]

Held further, that an action might be sustained upon the note in the name of the corporation. (*Ib.*)

Held also, that as the first section of the plaintiff's charter declares in express terms, that such persons as shall thereafter become stockholders of said company, *are constituted a body corporate*, and by the 4th sec. each subscriber for stock, *per se* becomes a corporator, and member of the company, and the fact that several persons had subscribed for stock previous to the defendant's subscription; this was sufficient to show that the corporation was so far *in esse*, at the time of making this note, as to be capable of taking the promise through their agents, the commissioners, notwithstanding their right to organize was made to depend upon certain conditions

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c. 16.

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So the charter of the Wilmington and Manchester Rail Road Company granted by the Legislature of North Carolina in 1846, makes it the duty of the commissioners to require the payment of \$5 on a share of each subscription in cash at the time of subscription, and declares all subscriptions void if this cash instalment is not made at the time the person subscribes. A note was given to one of the commissioners for the first instalment, instead of the cash. Held, (Pearson J. dissenting,) that the subscription was not void, and that the payee of the note could recover upon it. (*McRea v. Russell*, 12 *Iredell* 224.)

After the passage of the act incorporating the Charlotte and South Carolina Rail Road Company; the defendants signed a subscription paper, by which they agreed to take stock to the amount attached to their names provided the road should come to Columbia. They did not subscribe their names in the subscription book afterwards opened, nor comply with any other requisition of the charter, but refused to pay their subscriptions. The corporation brought their action against each defendant, for the two first instalments, which were demanded of each one, in the 1st count, as a subscriber to the stock of the company, and in the 2d count on an agreement to subscribe to the capital stock.

Held, that the action could not be maintained on either count. (*Charlotte & South Carolina Rail Road Company v. Blakly*, 3 *Strebhart* 245.)

Of notice to
delinquent
stockholders.

A by-law of a Rail Road corporation provided, that in the case of the sale of shares for the non-payment of assessments, the Treasurer should give notice to the delinquent owner, when his residence was known, of the time and place of sale, by letter, seasonably put into the mail. Held, that this by-law was *directory* to the Treasurer, and not a *condition precedent*; and that a written notice of the time and place of sale signed by the Treasurer and delivered to the owner of the shares, or left at his dwelling-house and received by him as soon as he was entitled to receive it by mail, was sufficient. (*Lexington & West Cambridge Rail Road Co. v. Chandler*, 13 *Met.* 311.)

It was held, under the 11th Sec. of the act incorporating the

Wilmington & Raleigh Rail Road Company, relating to delinquent stockholders, that it did not authorize a judgment against a defaulting stockholder, without his appearance, or without a process to call him into court. (*Rail Road Co. v. Baker*, 3 Dev. and Batt. 79.)

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Non-payment of Calls.

And with respect to the forfeiture of shares for non-payment of calls, be it enacted as follows :

Forfeiture of
shares for
nonpayment
of calls.

XXIX. If any shareholder fail to pay any call payable by him; together with the interest, if any, that shall have accrued thereon, the directors, at any time after the expiration of two months from the day appointed for payment of such call, may declare the share in respect of which such call was payable forfeited, and that whether the company have sued for the amount of such call or not (*w*).

*(*w*) The power given by this section is a cumulative remedy with that of the right of action, and therefore it is no defence to an action by a company for calls; that since the commencement of the suit the directors have declared the shares forfeited. (*Great Northern Railw. Co. v. Kennedy*, 6 Railw. C. 5; 7 D. & L. 197; 4 Exch. 417; *Inglis v. Great Northern Railw. Co.*, 1 Mac. H. L. C. 112. See *Giles v. Hutt*, 3 Exch. 18; 5 Railw. C. 505.)

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XXX. Before declaring any share forfeited the directors shall cause notice of such intention to be left at or transmitted by the post to the usual or last place of abode of the person appearing by the register of shareholders to be the proprietor of such share; and if the holder of any share be abroad, or if his usual or last place of abode be not known to the directors, by reason of its being imperfectly described in the shareholder's address book, or otherwise or if the interest in any such share shall be known by the directors to have become transmitted otherwise than by transfer as hereinbefore mentioned, but a declaration of such transmission shall not have been registered as aforesaid, and so the address of the parties to whom the same may have been transmitted, or may for the time being belong, shall not be known to the directors, the directors shall give public notice of such

Notice of
forfeiture to
be given be-
fore declara-
tion thereof.

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c. 16.
Sect. 30. intention in the London or Dublin Gazette, according as the company's principal place of business shall be situate in England or Ireland, and also in some newspaper as after mentioned; and the several notices aforesaid shall be given twenty-one days at least before the directors shall make such declaration of forfeiture (x).

Forfeiture of
shares.

(x) A railway act authorized the directors to sue for calls or to declare the shares belonging to any person or corporation, refusing or neglecting to pay, to be forfeited, and to order the same to be sold, provided that no advantage should be taken of any forfeiture of shares until notice in writing given, nor until the declaration of forfeiture should have been confirmed at a general or special general meeting of the company; after which requisites had been complied with, the company were authorized to sell the shares so forfeited. It was admitted that a declaration of forfeiture by the directors, with such notice in writing, was, without such confirmation, no defence to an action for calls. (*London and Brighton Railw. Co. v. Fairclough*, 3 Scott, N. R. 68; 2 Man. & G. 674; see 2 Railw. C. 544.)

By a railway act (6 & 7 Will. 4, c. lxxix. s. 130,) it was enacted, that if any owner or proprietor for the time being of a share should neglect or refuse to pay the calls thereon, the company might sue for and recover the same, or the directors might declare his shares to be forfeited and order them to be sold; provided that no advantage should be taken of

[145] *such forfeiture until notice to the owner that such share had been declared forfeited, nor until such declaration of forfeiture shall have been confirmed at a general or special general meeting of the company. In an action for calls it was proved that the company gave notice to the defendant, that if the calls were not paid by a certain day the shares would be declared forfeited. The calls were not paid, and the defendant afterward tendered his vote at a meeting of proprietors, when it was rejected; but the forfeiture was never confirmed by a meeting of the company. It was held, that the defendant could not avail himself of this state of facts as a

defence to the action, on the ground of not being a proprietor as the forfeiture does not attach till sanctioned by a meeting of the proprietors.

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c. 16.
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It was also held that the holders of scrip certificates were properly entered before the passing of the act, as proprietors though they had neither signed the parliamentary contracts nor been original subscribers; and that the register book, though irregularly kept in not containing the amount of the subscription paid on shares (sect. 125), was *prima facie* evidence that the defendant was a proprietor. (*Birmingham, Bristol and Thames Junction Railw. Co. v. Locke*, 2 Railw. C. 867; 2 Q. B. R. 256.) (1)

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(1) When a corporation has provided under the terms of the charter to forfeit stock partially paid up, this dissolves the connection of the stockholders with the Corporation when shares are forfeited, and a creditor cannot charge them with the amount unpaid. (*Allen v. Montgomery Rail Road Co.*, 11 *Alabama* 437.)

Where it appears to be the intention of the legislature that all shareholders shall pay rateably, the court of chancery will rectify an error which the directors have committed, and will take care that all the shareholders shall be put upon an equal footing with respect to the liability to pay calls. Certain persons, proposing to solicit an act of incorporation for making docks, executed the parliamentary deed and deed of management, by the first whereof they bound themselves (*inter alia*) to pay the sums subscribed by each of them as the directors should appoint. By the second they agreed to be bound by all measures which the directors should think expedient or necessary for obtaining the act. A bill for the above purpose passed the House of Commons. In order to comply with the Standing Orders of the House of Lords, requiring the subscription of four-fifths of the probable expense of the proposed work, and to make up the necessary capital, nine of the directors subscribed for one thousand additional shares each. The bill passed into an act, which provided (sections 94 and 95) that ten or more subscribers holding a specified

Equity will
interfere to
insure equal
liability to
calls.

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number of shares might summon general meetings. Section 125, that subscribers should pay calls on shares as the directors should appoint, which shares the directors might declare forfeited on non-payment of calls. Section 132, which enabled holders of shares to sell them, and prescribed the form of conveyance and memorial. Several of the shareholders, and amongst them the plaintiff, registered their shares, but the subscribers for the one thousand additional shares, did not register. At the time of entering into the additional subscriptions, the directors subscribing signed a memorandum declaring that the additional shares were held by them in trust for the company. At a meeting of the "directors a resolution was passed, "that the additional shares should be held in trust for the company." At a special general meeting of the company a resolution was passed, "that the trust entered into for the company should be annulled, and that the additional shares should be transferred to the secretary;" and at a meeting of directors such resolution was subsequently confirmed. The directors made two calls, which were paid on the registered shares but not on the additional shares. A third call having been made, and the plaintiff having not paid it, the directors were proceeding to declare his shares to be forfeited. It was held that the transfer of the additional shares to the secretary of the company without the specified form of conveyance and memorial was void. That the directors could not enforce the penalties imposed by the act on the non-payment of the third call on the plaintiff's shares until they had taken steps to compel payment of the two first calls on the additional shares. That suit for restraining the directors from declaring the plaintiff's shares forfeited, was well framed by the plaintiff on behalf of himself and all others the members not defendants, against those parties as defendants who had subscribed for the additional shares. (*Preston v. Grand Collier Dock Co.*, 2 Railw. Ca. 335 ; 11 Sim. 327 ; see *Mangles v. Grand Collier Dock Co.*, 2 Railw. C. 359, *ante*, 110.)

A court of equity will give no relief against a forfeiture

under a by-law of an incorporated company, providing that the member shall receive notice of default in paying a call, and incur the forfeiture by non-payment ten days after the notice sent, though the lapse arose from ignorance of the call, from accidental circumstances, and absence from town when the notice was sent. The accident in this case was only want of precaution. The plaintiff did not inform himself of the orders and rules of the company. It was easy for the plaintiff to direct the secretary to send the notices as he pleased. The court cannot relieve against such accidents. The plaintiff ought to have taken all due pains to inform himself. (*Sparkes v. Liverpool Water Works Co.*, 13 Ves. 428.)

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c. 16.
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Equity will
not relieve
against for-
feiture under
by-law.

A motion to restrain a company from declaring a forfeiture of shares, by reason of the non-payment of calls, alleged to be made for illegal purposes, was refused; although it appeared that the directors had conducted the proceedings, in many particulars, in a very improper manner, it being sworn that money was wanted to satisfy existing legal obligations of the company, and it being denied that the company sought to enforce the calls for illegal purposes. (*Logan v. Earl Courtown*, 13 Beav. 22; 20 Law J. Ch. 347.)

By a company's act, shares were to be forfeited on non-payment within a given time, of calls; and under certain circumstances, shareholders were entitled to receive interest on their paid up calls. A shareholder who had become so entitled to interest neglected to pay up a further call within the prescribed time. On a motion on her behalf to restrain the company from forfeiting the shares, she having offered to pay the difference between the amount of the call and the *interest that was due to her, she was permitted to pay the amount under protest, and without prejudice to the question in the cause. (*Naylor v. South Devon Railw. Co.*, 11 Jur. 31; 1 De G. & S. 32.)

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At a special general meeting of the London and Croydon Railway Company, duly convened for the purpose of raising a further sum of money, it was resolved that it should be

Time limited
for accept-
ance of
shares.

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raised by the creation of new shares at 20*l.* each, at the price of 10*l.* per share. The second resolution was in these words, "that every proprietor now registered, and also every holder of any scrip receipts who shall have delivered up the same on or before the 10th August (15 days off) to be duly registered, shall have the option of subscribing for one of such new shares for and in respect of every five shares which every such proprietor may now, or which every such scrip holder may on the said 10th August have registered in their name." The fourth resolution declared, that the shares which should not be subscribed for under the option allowed by the second condition should be allotted by the directors to those proprietors who might, on or before 10th August, have applied for any such shares *pro rata*, &c. P., a registered proprietor of a large number of shares, being resident abroad, did not hear of these resolutions until 12th August, when he wrote to the secretary of the company, stating his determination to subscribe for his proportionate number of shares. In the mean time the shares which remained unsubscribed for were appropriated according to the fourth resolution. Upon a bill by P. against the company and directors to have a transfer of his proportionate number of shares, it was held, upon the construction of the second and fourth resolutions, that the 10th August was the period at which the registered proprietors, as well as the holders of the scrip, were bound to elect, and a demurrer for the want of equity was allowed. (*Pearson v. London and Croydon Railw. Co.* Law. J. 1845, Ch. 412; 14 Sim. 541.)

The directors of a joint stock mining company, which was established in 1825, with a capital of two hundred shares of 50*l.* each, in respect of which calls to the full amount were shortly afterwards made, having occasion for a further capital for the purpose of carrying on the concern, which turned out unprofitable, proceeded under the powers of the deed constituting the company to raise money by several additional calls upon the existing shares. The plaintiff, who was a shareholder, and paid all previous calls to the full

amount of the original shares, disputed the payment of the ^{8 & 9 Vict.} additional calls until August, 1828, and in July in that year ^{c. 13.} his shares were declared forfeited. The company's speculation was conducted with loss until 1835, from which time forward considerable profits were realized. The plaintiff did nothing from 1828 until 1837, and in 1838 he filed his bill claiming a right to participate in the profits of the mine upon payment of his proportion of the expenses of working it. It was held that the plaintiff, having lain by when the concern was in a declining state, without any attempt to assert *his right, was not entitled in equity, after the risk was over, to a share in the profits of the adventure. (*Prendergast v. Turton*, 8 Jur. 205, C. ; Law J. 1844, C. 268 ; 1 Y & Coll. N. C. 98.) By one of the clauses in a deed of settlement on the formation of a joint stock banking company it was provided, "that all debts due to the company by or on the part of any proprietor in respect of cash advances or otherwise, should at all times and in all cases be the first and paramount lien on all the shares and stock of such proprietor ; and the directors were empowered to cancel, extinguish and declare forfeited, or to sell and dispose of such shares, either wholly or in part, as the case might require, by way of or towards satisfaction or liquidation of such debt ; and that every such person should thenceforth cease to be a proprietor of the company or to retain any interest therein in respect of the shares so cancelled, extinguished and declared to be forfeited or so to be sold or disposed of as aforesaid." A holder of 1000 shares being indebted to the bank for cash advances, a notice, dated the 30th May, 1837, was given to the shareholder, that unless he redeemed the 1000 shares by payment of the balance of his account with the bank on or before the 13th day of June, the directors would on that day proceed, under the clause of the deed of association, to cancel and extinguish and declare his shares forfeited, and to place the value of the shares on that day to the credit of his account with the bank. The balance not being paid, the directors by a resolution declared the shares to be cancelled and for-

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Forfeiture of
shares set
aside.

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feited; and it appearing to them that the value of the shares on that day was 10,000*l.*, it was resolved that credit should be given to the proprietor for that amount in his account. A bill was filed to set aside the cancellation. From the evidence it appeared that the market price of shares on the 13th day of July slightly exceeded the price allowed by the directors; but the evidence proved that if the 1000 shares had been carried into the market, the price would have been reduced greatly below the amount allowed by the directors. It was held that the directors, placing themselves by the cancellation in the situation both of vendors and purchasers, were bound to allow the highest market price which could be obtained for the shares, without speculating on what might be the effect of throwing the 1000 shares into the market, and the cancellation was declared to be void, and was set aside. (*Stubbs v. Lister*, 1 Y. & Coll. N. C. 81.)

Forfeiture to
be confirmed
by a general
meeting.

XXXI. The said declaration of forfeiture shall not take effect so as to authorize the sale or other disposition of any share until such declaration have been confirmed at some general meeting of the company to be held after the expiration of two months at the least from the day on which such notice of intention to make such declaration of forfeiture shall have been given; and it shall be lawful for the company to confirm such forfeiture at any such meeting, and by an *order at such meeting, or at any subsequent general meeting, to direct the share so forfeited to be sold or otherwise disposed of (*y*).

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Declaration
of action.

(*y*) By the Edinburgh and Leith Railway Act (6 & 7 Will. 4, c. cxxi., s. 49,) the directors were empowered to make the calls in manner therein mentioned, and to sue for them, in case of non-payment, by action of debt or otherwise, in their option; the proprietors neglecting to pay the same should forfeit all their shares for the benefit of the company, provided that no advantage should be taken of any such forfeiture until notice thereof given to the proprietor in manner therein mentioned, nor unless the same should be declared to be forfeited at some general or special meeting of the company

within six months after such forfeiture should happen, which declaration should *ipso jure* be a forfeiture of the shares. To an action of debt for calls, the defendant pleaded that by reason of having neglected to pay calls on his shares, they were in pursuance of the act declared by the directors to be forfeited, and the directors exercised and declared their option according to the act that the same should be forfeited, and the same then became and were forfeited, of which the defendant had due notice, and acquiesced in the forfeiture: it was held, on special demurrer, that the plea was bad, for not showing that the shares were declared to be forfeited at a general or special meeting of the company, according to the provisions of the act. (*Edinburgh, Leith and Newhaven Railw. Co. v. Hibblewhite*, 6 Mee. & W. 707; 2 Railw. C. 237; 8 Dowl. P. C. 802.)

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c 16
Sect. 32.

XXXII. After such confirmation as aforesaid it shall be lawful for the directors to sell the forfeited share, either by public auction or private contract, and if there be more than one such forfeited share, then either separately or together, as to them shall seem fit; and any shareholder may purchase any forfeited share so sold.

Sale of forfeited shares.

XXXIII. A declaration in writing, by some credible person not interested in the matter, made before any justice, or before any master or master extraordinary of the High Court of Chancery, that the call in respect of a share was made, and notice thereof given, and that default in payment of the call was made, and that the forfeiture of the share was declared and confirmed in manner hereinbefore required, shall be sufficient evidence of the facts therein stated; and such declaration, and the receipt of the treasurer of the company for the price of such share, shall constitute a good title to such share; and a certificate of proprietorship shall be delivered to such purchaser, and thereupon he shall be deemed the holder of such share, *discharged from all calls due prior to such purchase; and he shall not be bound to see the application of the purchase money, nor shall his title to such share be affected by any irregularity in the proceedings in reference to such sale.

Evidences as to forfeiture of shares.

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c. 16.

Sec 34.

No more
shares to be
sold than suf-
ficient for
payment of
calls.

On payment
of calls be-
fore sale the
forfeited
shares to re-
vert.

XXXIV. The company shall not sell or transfer more of the shares of any such defaulter than will be sufficient, as nearly as can be ascertained at the time of such sale, to pay the arrears then due from such defaulter on account of any calls, together with interest, and the expenses attending such sale and declaration of forfeiture; and if the money produced by the sale of any such forfeited shares be more than sufficient to pay all arrears of calls and interest thereon due at the time of such sale, and the expenses attending the declaration of forfeiture and sale thereof, the surplus shall, on demand, be paid to the defaulter.

XXXV. If payment of such arrears of calls and interest and expenses be made before any share so forfeited and vested in the company shall have been sold, such share shall revert to the party to whom the same belonged before such forfeiture, in such manner as if the calls had been duly paid.

Remedies against Shareholders.

Execution a-
gainst share-
holders to the
extent of
their shares
in capital not
paid up.

And with respect to the remedies of creditors of the company against the shareholders, be it enacted as follows:

XXXVI. If any execution, either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any of the shareholders to the extent of their shares respectively in the capital of the company not then paid up: provided always, that no such execution shall issue against any shareholder except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court after sufficient notice in writing to the persons sought to be charged; and upon such motion such court may order execution to issue accordingly, and for the purpose of ascertaining the names of the shareholders, and the amount of capital remaining to be paid upon their respective shares, it shall be lawful for any person entitled to any such execution, at all reasonable times, to inspect the register of shareholders without fee (z).

Scire facias.

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(z) It is a general rule that a person not party to the record* shall not be affected by it without a *scire facias*.— (*Ransford v. Bosanquet*, 12 Ad. & E. 813; *Cross v. Law*, 6 Mee. & W. 217; *Whittenbury v. Law*, 6 Bing. N. C.

345 ; *Eardley v. Law*, 12 Ad. & E. 802 ; *Wingfield v. Barton*, 2 Dowl. N. S. 355.) In order to obtain execution against a shareholder under this statute a *scire facias* must be issued, by which the party is ordered to show cause why execution should not issue against him.

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Under this section the court will not order execution to issue against a shareholder of a company without *scire facias* but will only upon sufficient ground being shown, allow a sci. fa. to issue, in order that execution may issue against such shareholder to the extent pointed out by this section. A suggestion is not the proper course. (*Hitchings v. Kilkenny, &c. Railw. Co.*, *In re Emry*, 16 Jur. 336 ; 20 L. J., C. P. 31 ; 10 C. B. 160.)

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It is not sufficient, in order to obtain leave for issuing such sci. fa. to show that fi. fa.'s have been issued against the effects of the company into two counties, and nulla bona returned to them. (*Ib.*)

A *scire facias* may issue at the suit of a judgment creditor of a company, subject to the provisions of this act against a shareholder ; but it was questioned whether that is the sole remedy. (*Devereux v. Kilkenny and Great Southern and Western Railw. Co.*, 1 Prac. Rep. 788 ; 5 Exch. 834 ; 20 L. J., Exch. 37.)

Where it is proved to the satisfaction of the court, upon motion for such *scire facias*, that an execution has been issued against the company, and that it has been unproductive, the issuing of the *scire facias* is still a matter of discretion with the court. (*Ib.*)

Where the company was established for making a railway in Ireland, although no proceedings had been taken to procure satisfaction in Ireland, and the affidavits did not expressly negative the existence of property there, the court granted the rule for a *scire facias* against a director who had stated at a meeting of the company, in London, that in consequence of the shareholders not paying the calls, the directors had no funds to meet the claims against them, one

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Such *scire facias* should state that the party against whom it issues is a shareholder in the company, together with the amount due on his shares; and also that the execution has issued against the property of the company, and been found unavailing to satisfy the plaintiff's claim; all which allegation are traversable. (*Ib.*)

It was questioned whether this section applies where the company is plaintiff. (*Kilkenny Railw. Co. v. Fielden*, 15 Jur. 191; 6 Exch. 81.)

[*152] By the 32d section of the special act of a railway company, it was provided that the bond creditors and mortgagees of the company should be entitled to be paid out of the tolls and other estate and effects of the company the sums advanced. *&c., and that in all other respects the provisions of this act should be applicable: it was held, that having regard to the 36th and 44th sections of this act, a bond creditor had no lien on the estate or effects of the company, and that the goods and chattels of the company were liable to be seized under a writ of *fi. fia.* at the suit of a judgment creditor. (*Russell v. East Anglian Railw. Co.*, 3 Mac. & G. 125; 15 Jur. 935; 20 L. J. Ch. 257; 6 Railw. C. 501, 532.)

The company having raised large sums of money by bond and on mortgage, and being also considerably indebted on simple contract, agreed with one of their simple contract creditors to suffer judgment to be entered up against the company at a future day. After this agreement, various negotiations took place between the bond and other creditors of the company and the company, with the view of postponing on certain terms the enforcement of all claims, as well by specialty as simple contract, against the company for seven years: these terms were accepted by the great majority of the creditors, but rejected by the simple contract creditor. After such rejection, but before the period for issuing execution had arrived, a bill was filed by one of the

bond creditors against the company and its other specialty creditors for the enforcement of his alleged equitable lien and for the appointment of a receiver. The receiver was appointed by the consent of all parties to the suit, and entered into the possession of all the chattels of the company. The simple contract creditor then sued out execution against the company: it was held, on the petition of the simple contract creditor, that, inasmuch as the order appointing a receiver was obtained by a surprise on the court, and did not rest on an equity which could be maintained, and would not have been made if all the circumstances of the case had been brought before the court, the simple contract creditor ought to be allowed to levy upon the goods and chattels of the company notwithstanding the order. (*Ib.*)

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It was held also, that inasmuch as all the facts of the case were admitted, and were before the court on the petition, the court would dispense with the usual reference to the master to examine the petitioners pro interesse suo. (*Ib.*)

The 33d section of the special act empowered bond creditors and mortgagees of the company to enforce the payment of the arrears of principal and interest by the appointment of a receiver: it was held, that having regard to the 53d and 54th sections of this act (see *post*, pp. 161, 162), the receiver indicated in the 33d section of the special act was the receiver to be appointed by two justices under the 53d and 54th section of this act. (*Ib.*)

The statute 4 & 5 Vict. c. 89, for enabling the Patent Rolling and Compressing Iron Company to sue and be sued in the name of their secretary, enacted that every judgment might be lawfully executed against, and have the like effect upon, the personal estate of every individual shareholder as if he had been by name a party to the proceedings: provided that no execution against any person being or having ceased to be, a shareholder shall be issued without leave *granted by the court in which the judgment, &c. shall have been obtained upon a motion in open court, and after notice

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of such motion given to the person to be charged : it was held, that such execution could not be issued against an individual shareholder merely on motion, but that there must be a previous *scire facias*. (*Clowes v. Brettell*, 10 Mee. & W. 506; Law. J. 1843, Exch. 8. See *Bradley v. Eyre*, 11 Mee. & W. 432; Law. J. 1843, Exch. 450; *Underhill v. Devereux*, 2 Wms. Saund. 71 a; Bac. Abr. Scire Facias; *Phillipson v. Earl of Egremont*, Law J. 1845, Q. B. 25; *Bradley v. Urquhart*, 11 Mee. & W. 456.)

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Liability of
shareholders.

The special act sometimes provides that no shareholder of the company shall be liable for or charged with the payment of any debt or demand due from the company beyond the extent of his share in the capital not then paid up.

A creditor of
corporation may compel
the payment
of the stock
subscribed.

In Alabama it was held, that where stockholders are not in default to the corporation by reason of no calls having been made, but whose subscription to the capital stock had not been paid; a Court of Equity has jurisdiction to compel payment, at the instance of an execution of creditor of the corporation. (*Allen v. Montgomery Rail Road Company*, 11 Alabama 437.)

And though at Common Law, upon the dissolution of a corporation, the debts due to and from the corporation are extinguished; yet a creditor of the corporation has a right to have the unpaid stock called in to satisfy his debt; and unpaid subscriptions to the capital stock of the Company, are corporate property which can be reached by the creditors in a Court of Equity, and this right exists independent of any Statute provision (*Hightower v. Thornton*, 8 Georgia 486.)

Shares in
public com-
panies be-
longing to
the debitor
and standing
in his own
name to be
charged by
order of a
judge.

By stat. 1 & 2 Vict. c. 110, s. 14 (3 & 4 Vict. c. 105 s. 23, Ireland,) it is enacted, if any person against whom any judgment shall have been entered up in any of her majesty's superior courts at Westminster or Dublin, shall have any shares of or in any public company in England or Ireland (whether incorporated or not,) standing in his name in his own right, or in the name of any person in trust for him, a judge of one of such courts, on the application of any judgment creditor, may order such shares, or any part thereof,

to be charged with the payment of the amount of a judgment debt, and interest thereon, and such order shall entitle the judgment creditor to the same remedies as if such charge had been made in his favor by the judgment debtor ; but no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order.

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In order to prevent any person against whom judgment shall have been obtained from disposing of any shares thereby authorized to be charged for the benefit of the judgment creditor under an order of a judge, every order of a judge charging any shares in any public company, under that act, shall be made in the first instance *ex parte*, and without any notice to the judgment debtor, and shall be an order to show cause, only ; and such order, as to any shares in any public company standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, shall restrain such public company from permitting a transfer thereof until such order shall be made absolute or discharged ; and that if after notice of such order to any authorized agent of such corporation, and before the same order shall be discharged or made absolute, such corporation shall permit any such transfer to be made, then the corporation so permitting such transfer shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment ; and that no disposition of the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor ; and further, that unless the judgment debtor shall within a time to be mentioned* in such order show to a judge of one of the said superior courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute ; provided that any such judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as

Order of
judge to be
made in the
first instance
ex parte, and
on notice to
company to
operate as a
distringas.

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he may think fit. (1 & 2 Vict. 110, s. 15; 3 & 4 Vict. c. 105, s. 24, Ireland.) The stat. 3 & 4 Vict. c. 82, s. 1, declares and enacts, that the aforesaid provisions of the act 1 & 2 Vict. c. 110, s. 14, shall extend to the interest of any judgment debtor, whether in possession, remainder or reversion, and whether vested or contingent, as well in any shares as aforesaid, as also in the interest of any shares; and whenever any such judgment debtor shall have any interest, vested or contingent, in possession, remainder or reversion, in any such shares as aforesaid, standing in the name of the accountant-general of the Court of Chancery, or the accountant-general of the Court of Exchequer, or in the interest thereof, such judge may make any order as to such shares, or the net produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor; but no order of any judge as to any shares standing in the name of the accountant-general of the Court of Chancery, or the accountant-general of the Court of Exchequer, or as to the interest thereof, shall prevent any public company from permitting any transfer of such shares, or payment of the interest thereof, in such manner as the Court of Chancery or the Court of Exchequer respectively may direct, or shall have any greater effect than if such debtor had charged such shares, or the interest thereof, in favor of the judgment creditor, with the amount of the sum to be mentioned in any such order. So in the event of an insolvent petitioner having any shares, the insolvent Court may order all persons, whose consent may be necessary, to transfer the shares into the name of the assignee. (1 & 2 Vict. c. 110, s. 54; see *ante*, p. 120.)

A judge of the Court of Chancery is not a judge of one of the superior courts at Westminster, within the meaning of the 14th section 1 & 2 Vict. c. 110, and has no jurisdiction under that section to order monies invested in the name of the accountant-general to stand charged with a judgment debt recovered at law against the party entitled to such funds, but the application should be made to one of the com-

mon law judges of the superior courts at Westminster. (*Miles v. Presland*, 4 My. & Cr. 431; 2 Beav. 300.) A judge at chambers only, and not the court, has authority under the statute 1 & 2 Vict. c. 110, s. 14, to make an order to charge a fund with the payment of money recovered by a judgment; if he makes an absolute order, the court has jurisdiction to set it aside if wrongly made; but if he only makes an order *nisi*, the Court has no authority to entertain the question, although the judge expresses his desire to refer it to the court. (*Brown v. Bamford*, 9 Mees. & W. 42. *See *Baldwin v. Timbrell*, 6 Jur. 488, *Rogers v. Holloway*, 7 Jur. 932; 6 Scott, N. R. 274; Shelford's Real Property Statutes, pp. 506, 507, 5th ed.; *Watts v. Jefferies*; 3 Mac. & G. 372; *Courtoy v. Vincent*, 21 Law J. Ch. 291. And as to proof of vesting order under 1 & 2 Vict. c. 110, ss. 46, 105, see *Jackson v. Gurnett*, 2 Q. B. R. 887; *Delafield v. Freeman*, 6 Bing. 294; *Hounsfield v. Drury*, 11 Ad. & E. 98.) (1)

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(1) An affidavit in support of an application under the companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, for a *scire facias* for execution against a shareholder on a judgment against a railway company, stated that the deponent "having been foiled in his attempts to obtain a sight of the register, and so obtain authentic and official information on the subject, deponent instituted inquiries *aliunde* as to who really were the shareholders of the company, and hath been credibly informed by parties officially connected with the said railway, and which information deponent verily believes to be true, that the said J. F. F., who has been a director of the said company from the commencement, was a duly registered shareholder of seventy shares in the said company and that 1,085*l* was due thereon in respect of subscriptions not called up, the shares in the said company being 20*l*. shares, and only 4*l*. 10*s*. per share having been paid up or called ;—

What *prima facie* evidence of a party being a shareholder.

Held, that this affidavit unanswered was good *prima facie* evidence of the party being a shareholder of the company. *Rastrick v. the Derbyshire, Staffordshire, and Worcestershire Junction Railway Company*, 24 Eng. Law and Eq. 405.

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c. 16.

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Reimburse-
ment of such
shareholders,

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XXXVII. If by means of any such execution any shareholder shall have paid any sum of money beyond the amount then due from him in respect of calls, he shall forthwith be reimbursed such additional sum by the directors out of the funds of the company.

Power to borrow Money.

And with respect to the borrowing of money by the company on mortgage or bond, be it enacted as follows :

Power to
borrow mon-
ey.

XXXVIII. If the company be authorized by the special act to borrow money on mortgage or bond, it shall be lawful for them, subject to the restrictions contained in the special act, to borrow on mortgage or bond such sums of money as shall from time to time, by an order of a general meeting of the company, be authorized to be borrowed, not exceeding in the whole the sum prescribed by the special act, and for securing the repayment of the money so borrowed, with interest, to mortgage the undertaking, and the future calls on the shareholders, or to give bonds in manner hereinafter mentioned (a).

Construction
of powers in
acts to bor-
row money.

(a) By a railway act, (11 Geo. 4, c. lxi. s. 75,) a company were empowered to borrow money on the credit of the undertaking, and to "assign and charge the property of the undertaking, and the rates and tolls, as a security for the money borrowed." The clause contained a form of mortgage, by which the said undertaking, and all and singular the rates, tolls and other sums arising by virtue of the act, and all the estate, right, title and interest of, in and to the same were to be assigned to the mortgagee, until the principal sum and interest should be fully paid. By deed poll the company assigned to the mortgagee "said undertaking," and all and singular the rates, &c. unto the mortgagee, until the sum borrowed and interest should be paid. In an ejectment by the mortgagee to recover the undertaking it was held, that the land of the company was not included in the mortgage under the word "undertaking," and did not pass by such mortgage. (*Denman*, C. J., said in his opinion, there is nothing in the words the "said undertaking" to justify the con-

struction that they contained a demise of the land, or of any portion of the real estate of the defendants. Such a demise would not only be exceedingly improbable, but very inconvenient* to the public, as it would perchance prevent the carrying on the very "undertaking," by means of which the defendants were to be enabled to satisfy the demands of their creditors, and to promote the convenience of the public. (*Doe d. Myatt v. St. Helen's and Runcorn Gap. Railw. Co.*, 2. Railw. C. 756 ; 2 Q. B. R. 264.)

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c. 16.
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By a canal act the company were empowered to borrow and take up money upon the credit of the undertaking, and the rates and duties made payable by the act, and by writing under their common seal to mortgage or assign over the undertaking and the rates or duties to the persons advancing the money, as a security for the money borrowed; and a form of mortgage was given, whereby the company engaged to pay the interest half-yearly; it was held, that the property of the company and the rates or duties alone were pledged for the payment of the monies advanced, and that the proprietors were not liable to be sued in covenant for the arrears of interest. The terms of the contract were thought to be satisfied by giving the lenders of the money a security on the undertaking, without allowing them to sue the corporation. The remedy would be entering on the property of the company. (*Pontet v. Basingstoke Canal Co.*, 4 Scott, 182 ; 3 Bing. N. C. 433.)

The Deptford Pier Company, having contracted for the purchase of certain lands applied to *W. T. P.* to lend them the money to complete their contract, which he accordingly did. The conveyances were made to *W. T. P.* by way of mortgage, for securing the repayment of the sum advanced, and subject thereto in trust for the company. *W. T. P.* afterwards obtained judgment, and was about to get possession under an *elegit*. The mortgagees of the "tolls, rates and duties," who had advanced monies to the company on the security of certain mortgage debentures issued by the company in conformity with a power contained in the 16th section of their act, filed their bill against the mortgagees of

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c. 16
Sect. 38.

the land, for the purpose of having the priority of such debentures declared, and praying an injunction and receiver. It was held, upon demurrer, that the plaintiffs were right in using the powers the law gave them, and that there was no equity in the mortgagees of the tolls, rates and duties, as against the mortgagees of the land, for the plaintiffs, had no right to the lands in mortgage, or which were subject to the defendant's judgments, except such as it is to be inferred from the circuitous way in which the plaintiffs had taken debentures on the tolls. The demurrer was allowed with costs. (*Perkins v. Pritchard*, 3 Railw. Cas. 95, 13 Sim. 277. See *Pardoe v. Price*, 13 Mees. & W. 267.)

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A canal company conveyed under their common seal the canal, works and rates to a mortgagee, to hold until repayment of certain money borrowed and interest. There was no covenant to repay. It was held under 3 & 4 Will. 4, c. 27, s. 42, that although the mortgagee could recover the principal within twenty years, yet his remedy for arrears of interest was limited to six years. There being no covenant or* engagement to pay, but simply a conveyance of the canal, there was not the species of action of covenant, or of debt upon bond or other speciality, referred to in the statute 3 & 4 Will. 4, c. 42, s. 3. (*Hodges v. Croydon Canal Co.*, 3 Beav. 86. See Shelford's Real Property Statutes, pp. 246, 257, 5th ed.)

By a railway mortgage debenture, the defendants assigned to the plaintiffs "the said undertaking, and all the estate, right, title and interest in the same, to hold until the sum of 1000*l.*, together with interest for the same, at the rate of 5*l.* for every 100*l.* by the year, should be satisfied; the principal sum to be paid on the 1st. January, 1851." It was held, that irrespective of any legislative enactment, the first part of the debenture operated simply as a transfer of the subject matter till the sum was satisfied, i. e. the tolls, the unpaid calls, and all which belonged to the company as proprietors of the railway, which any one is at liberty to use on paying tolls, but not the stock or property belonging to the company

as common carriers of passengers or goods for hire ; nor according to *Doe d. Myatt v. St. Helen's* ante p. 156, the soil of the railway itself. But the stipulation that the principal was to be paid on the 1st January, 1851, imported a covenant by the company, that the same should be paid unless the special acts qualified that expression, and therefore imposed on the company an obligation to repay the principal on a certain day, for the breach of which an action would lie against the company, the judgment on which action would be satisfied out of their general property as proprietors, but not out of their stock or property as carriers. (*Hart v. Eastern Union Railw. Co.* 6 Railw. C. 818 ; 7 Exch. 246.) This judgment was affirmed upon writ of error, in giving judgment upon which *Coleridge, J.*, said, "We are clearly of opinion that where a corporation is created for certain purposes, with power to sue and be sued, and to borrow money for the completion of these purposes, and to secure the repayment of such money by an instrument which, on the face of it, imports a covenant for repayment, if money be so borrowed, and, so secured, an action may be maintained against the corporation on a breach of the covenant." (*Ib.* p. 827 ; 22 Law J. Exch. 20.)

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An action lies on a bond given by an incorporated company to secure a loan, although the act declares that the bondholders and mortgagees shall be "equally entitled to a claim or lien on the rates, tolls and profits, without any preference one over the other." The effect of such words must be considered when the plaintiff seeks to issue execution or to assign breaches upon the bond. (*Bolckow v. Herne Bay Pier Co.* 1 Q. B. N. S. 74 ; 22 Law J. Q. B. 33.) (1)

(1) Although a corporation, by a special provision in its charter is empowered to mortgage its effects &c., for a particular purpose, this will not be construed as taking away, or abridging its general powers to execute mortgages for the benefit of creditors. (11 *Alabama*, 437.)

XXXIX. If after having borrowed any part of the money so authorized to be borrowed on mortgage or bond, the Power to re-borrow.

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c 16.
Sect 40.
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company pay off the same, it shall be lawful for them again to borrow the amount so paid off, and so from time to time ; but such power of reborrowing *shall not be exercised without the authority of a general meeting of the company, unless the money be so reborrowed in order to pay off any existing mortgage or bond.

Evidence of
authority for
borrowing.

XL. Where by the special act the company shall be restricted from borrowing any money on mortgage or bond until a definite portion of their capital shall be subscribed or paid up, or where by this or the special act the authority of a general meeting is required for such borrowing, the certificate of a justice that such definite portion of the capital has been subscribed or paid up, and a copy of the order of a general meeting of the company authorizing the borrowing of any money, certified by one of the directors or by the secretary to be a true copy, shall be sufficient evidence of the fact of the capital required to be subscribed or paid up, having been so subscribed or paid, and of the order for borrowing money having been made ; and upon production to any justice of the books of the company, and of such other evidence as he shall think sufficient, such justice shall grant the certificate aforesaid.

Mortgages
and bonds to
be stamped.

XLI. Every mortgage and bond for securing money borrowed by the company shall be by deed under the common seal of the company, duly stamped, and wherein the consideration shall be truly stated ; and every such mortgage deed or bond may be according to the form in the schedule (C.) or (D.) to this act annexed, or to the like effect (a).

(a) See forms in the Appendix.

Rights of
mortgagees.

XLII. The respective mortgagees shall be entitled one with another to their respective proportions of the tolls, sums, and premises comprised in such mortgages, and of the future calls payable by the shareholders, if comprised therein, according to the respective sums in such mortgages mentioned to be advanced by such mortgagees respectively, and to be repaid the sums so advanced, with interest, without any preference one above another by reason of priority of the date of any such mortgage, or of the meeting at which the same was authorized.

XLIII. No such mortgage (although it should comprise future calls on the shareholders) shall, unless expressly so provided, preclude the company from receiving and applying to the purpose of the company any calls to be made by the company.

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c. 16.
Application
of calls. not-
withstanding
mortgage.

XLIV. The respective obligees in such bonds shall, proportionally according to the amount of the monies* secured thereby, be entitled to be paid, out of the tolls or other property or effects of the company, the respective sums in such bonds mentioned, and thereby intended to be secured, without any preference one above another by reason of priority of date of any such bond, or of the meeting at which the same was authorized, or otherwise howsoever. (b).

Rights of
obligees.

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(b) See *Russell v. East Anglian Railw. Co.*, 3 Mac. & G. 125; 6 Railw. C. 501, *ante*, p. 152.

XLV. A register of mortgages and bonds shall be kept by the secretary, and within fourteen days after the date of any such mortgage or bond, an entry or memorial, specifying the number and date of such mortgage or bond, and the sums secured thereby, and the names of the parties thereto, with their proper additions, shall be made in such register; and such register may be perused at all reasonable times by any of the shareholders, or by any mortgagee or bond creditor of the company, or by any person interested in any such mortgage or bond, without fee or reward.

Register of
mortgages
and bonds.

XLVI. Any party entitled to any such mortgage or bond may from time to time transfer his right and interest therein to any other person; and every such transfer shall be by deed duly stamped, wherein the consideration shall be truly stated; and every such transfer may be according to the form in the schedule (E.) to this act annexed, or to the like effect (c).

Transfers of
mortgages
and bonds to
be stamped.

(c) See Form in the Appendix.

Where a bond given by a railway company has been assigned in accordance with this section, the proper party to sue on it is the assignee, not the original obligee. (*Vertue v. East Anglian Railw. Co.*, 1 Prac. Rep. 302; 19 L. J., Exch. 235; 6 Railw. C. 252.)

Where such assignment is pleaded, an averment that the

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c 16

Sect. 47.

money for which the bond was given was borrowed "in pursuance and in exercise of the powers vested in the company under and by virtue of their act" (which incorporated this act), is sufficient, without alleging that a general meeting had been held, and an order made as is required by the 38th section of this act. (*Ib.*, ante, p. 155.)

Transfers of
mortgages
and bonds to
be registered.

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XLVII. Within thirty days after the date of every such transfer, if executed within the united kingdom, or otherwise within thirty days after the arrival thereof in the united kingdom, it shall be produced to the secretary, and thereupon the secretary shall cause an entry or memorial thereof to be made in the same manner as in the case of the original mortgage; and after such entry every such transfer shall entitle the transferee to the full benefit of the original mortgage*or bond in all respects; and no party, having made such transfer, shall have power to make void, release or discharge the mortgage or bond so transferred, or any money thereby secured; and for such entry the company may demand a sum not exceeding the prescribed sum, or, where no sum shall be prescribed, the sum of two shillings and sixpence; and until such entry the company shall not be in any manner responsible to the transferee in respect of such mortgage (*d*).

(*d*) By a local and personal act, transfers of debentures were to be, by indorsement, by deed, and in a given form, and were to be entered in the books of the company, and after such entry, and not till then, the assignee was to be entitled to the benefit: it was held, that this did not apply to a transfer by act of law, as in the case of bankruptcy. (*Lane v. Smith*, 14 Beav. 49.)

Payment of
interest on
monies bor-
rowed.

XLVIII. The interest of the money borrowed upon any such mortgage or bond shall be paid at the periods appointed in such mortgage or bond, and if no period be appointed, half-yearly, to the several parties entitled thereto, and in preference to any dividends payable to the shareholders of the company.

Transfers of
interest to be
stamped.

XLIX. The interest on any such mortgage or bond shall not be transferable, except by deed duly stamped.

L. The company may, if they think proper, fix a period for the repayment of the principal money so borrowed, with the interest thereof, and in such case the company shall cause such period to be inserted in the mortgage deed or bond; and upon the expiration of such period the principal sum, together with arrears of interest thereon, shall, on demand, be paid to the party entitled to such mortgage or bond (e); and if no other place of payment be inserted in such mortgage deed or bond, such principal and interest shall be payable at the principal office or place of business of the company.

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Repayment
of money
borrowed at
a time fixed.

(e) The meaning of this seems to be that if the money is not paid on the day fixed it must be enforced by action. (*Hart v. Eastern Union Railw. Co.*, 6 Railw. C. 826.)

LI. If no time be fixed in the mortgage deed or bond for there payment of the money so borrowed, the party entitled to the mortgage or bond may, at the expiration or at any time after the expiration of twelve months from the date of such mortgage or bond, demand payment of the principal money thereby secured, with all arrears of interest, upon giving six months' previous notice for that purpose: and in the like case the company may at any time pay off the money borrowed, on giving the like notice; and every such notice shall be in writing or print, or both, and if given by a mortgagee or bond creditor shall be delivered to the secretary or left at the principal office of the company, and if given by the company shall be given either personally to such mortgagee or bond creditor or left at his residence, or if such mortgagee or bond creditor be unknown to the directors, or cannot be found after diligent inquiry, such notice shall be given by advertisement in the London or Dublin Gazette, according as the principal office of the company shall be in England or Ireland, and in some newspaper as after mentioned.

Repayment
of money
borrowed
where no
time fixed.

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LII. If the company shall have given notice of their intention to pay off any such mortgage or bond at a time when the same may lawfully be paid off by them, then at the expiration of such notice all further interest shall cease to be payable on such mortgage or bond, unless on demand of payment made pursuant to such notice, or at any time thereafter.

Interest to
cease on ex-
piration of
notice to pay
off mortgage
or bond.

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ter, the company shall fail to pay the principal and interest due at the expiration of such notice, on such mortgage or bond (f).

Interest on
railway de-
bentures.

(f) The great Western Railway Company issued to the plaintiffs debentures, assigning in consideration of 1000*l.* unto the plaintiffs, the said undertaking, and all the estate, &c., to hold the same until the said sum of 1000*l.* together with interest for the same, after the rate of 5*l.* for every 100*l.* for a year, payable as thereafter mentioned should be fully paid. And it was stipulated, that the said principal sum should be payable and paid on the 15th of January, 1844, and that in the meantime the said company should, in respect of interest as aforesaid on the said principal sum, pay to the bearer of the coupons or interest warrants thereunto annexed, the several sums mentioned in such warrant respectively, &c. In January, 1844, the interest due on the bonds up to the 15th of January, 1844, was paid to the plaintiffs. The company did not then pay, nor did the plaintiffs require the principal, nor did the company give to the plaintiffs notice that they were ready to pay: it was held, that these debentures continued to carry interest from the 15th of January, 1844, until payment. (*Prince v. Great Western Railw. Co.*, 4 Railw. Cas. 707; 16 Mee. & W. 244.)

Arrears of in-
terests when
to be enforced
by ap-
pointment of
a receiver,

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LIII. Where by the special act the mortgagees of the company shall be empowered to enforce the payment of the arrears of interest, or the arrears of principal and interest, due on such mortgages, by the appointment of a receiver, then, if within thirty days after the interest accruing upon any such mortgage *has become payable, and, after demand thereof in writing, the same be not paid, the mortgagee may, without prejudice to his right to sue for the interest so in arrear in any of the superior courts of law or equity, require the appointment of a receiver, by an application to be made as hereinafter provided; and if within six months after the principal money owing upon any such mortgage has become payable, and after demand thereof in writing, the same be not paid, the mortgagee, without prejudice to his right to sue for such principal money, together with all arrears of inter-

est, in any of the superior courts of law or equity, may if his debt amount to the prescribed sum alone, or, if his debt does not amount to the prescribed sum, he or, in conjunction with other mortgagees whose debts, being so in arrear, after demand as aforesaid, shall, together with his, amount to the prescribed sum, require the appointment of a receiver by an application to be made as hereinafter provided. (g).

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c. 16.
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Arrears of
principal and
interest.

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(g) See *Russell v. East Anglian Railw. Co.*, 3 Mac. & G. 125 ; 6 Railw. C. 501, 532, ante, p. 152.

LIV. Every application for a receiver in the cases aforesaid shall be made to two justices, and on any such application it shall be lawful for such justices, by order in writing, after hearing the parties, to appoint some person to receive the whole or a competent part of the tolls or sums liable to the payment of such interest, or such principal and interest, as the case may be, until such interest, or until such principal and interest as the case may be, together with all costs including the charges of receiving the tolls or sums aforesaid be fully paid ; and upon such appointment being made all such tolls and sums of money as aforesaid shall be paid to and received by the person so to be appointed ; and the money so to be received shall be so much money received by or to the use of the party to whom such interest, or such principal and interest, as the case may be, shall be then due, and on whose behalf such receiver shall have been appointed : and after such interest and costs, or such principal, interest and costs, have been so received, the power of such receiver shall cease (h).

Appointment
of receiver,

(h) See *Russell v. East Anglian Railw. Co.*, 3 Mac. & G. 125 ; 6 Railw. C. 501, 532, ante p. 152. (1)

(1) A receiver will be appointed by a court of chancery in a proper case with the usual powers ; and in what cases the court will appoint, and when an objection for want of proper parties, will be overruled, and of their powers, and the consequences of such appointment ; see the case of *Fripp v. the Chard Railw. Co.*, 21 Eng. Law and Eq. 53

The facts and the points established were as follows :

By various acts of parliament to amend, extend, &c., the C.

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c 15.
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company and the B. and T. company, two canal and railway companies, were formed, with successive powers of increasing their capital and borrowing various sums of money, according to a short mortgage form. Priority was secured to the successive amounts authorized to be borrowed, but each set of mortgages were, *inter se, pari passu*. The interest on all the moneys due was very many years in arrear, and both companies were utterly unable at present to pay either principal or interest. The C. company was not disturbed in its possession of its premises; but as to the other company, the B. and T. company, T. F., the present plaintiff being one of a second set of mortgagees, had sued for his money in 1845, and thereupon R., another of his co-mortgagees, obtained a judgment, and entered into possession on behalf of himself and all other his co-mortgagees. The C. company and R., with the consent of the B. and T. company, had devolved the whole management of both companies into the hands of J. F., who was largely interested in an adjoining colliery, and was the principal customer of both the C. company and the B. and T. company. In 1853, on a bill filed by T. F. to have J. F. removed from being manager, and to have a receiver and manager appointed, and for an account, on the ground of J. F. not holding an even hand in the dealings between himself and the two companies:—

Held, that T. F. was entitled to have such a receiver appointed.

A receiver and manager may be appointed of the property of a parliamentary corporation, although by the act a committee was constituted, to whom all the powers of management were referred; but in the principal case the receiver was not empowered to manage.

A provision in the act, that any mortgagee whose interest was in arrears, for twenty-one days, might have a receiver appointed on application to two justices, does not oust the jurisdiction of this court to appoint a receiver with the usual powers.

A corporation, put out of possession by a receiver under an order of this court, will be protected by the court against the consequences of such loss of possession, under the liberty to apply.

A receiver may be appointed, although the person applying has the legal estate, as against the person whose possession he seeks to oust, where the property is in the nature of a trade.

Objection for want of parties overruled, although they were only

eight in number, and all named in a clause of the bill the court being of opinion that there was no apparent utility in making them parties.

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c. 16
Sect. 55.

Although there may be nothing against the character or ability of a person, yet if he have a private interest in conflict with the management, he will not only not be selected to receive and manage, but will be removed from a situation which he already lawfully occupies.

An arrangement was made by resolution of a board of directors, and by indenture, by which a canal company agreed with J. F., that if he would carry 12,000 tons per annum, or more, along their canal, he should pay but 1 1*d.* per ton per mile; and so for any other party carrying a similar quantity. All other persons were charged 2*d.* per ton per mile, which was the rate published on the painted toll boards, under the acts of the company, which directed that all tolls should be so painted. Whether the lower rate of 1 1*d.* per ton per mile, were legal until painted up on the board, *quære*?

A mortgagee, not receiving any interest for eight years, but acquiescing in the management of the canal during all that time, may at the end of that time bring his bill to have the management changed.

A mortgagee claiming to have the management of the company changed, *semble* if he have only a small interest, that will be a ground for not listening to the application.

The court will interfere on an interlocutory application to appoint a receiver, notwithstanding grave doubts as to the propriety of the frame of the suit, and the necessity of making additional parties.

LV. At all seasonable times the books of account of the company shall be open to the inspection of the *respective mortgagees and bond creditors thereof, with liberty to take extracts therefrom, without fee or reward (*i*).

Access to account books by mortgagees.

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(*i*) See 8 & 9 Vict. c. 16, s. 10, *ante* p. 97, n.

Conversion of Loans into Capital.

And with respect to the conversion of the borrowed money into capital, be it enacted as follows:

Power to convert loan into capital.

LVI. It shall be lawful for the company, if they think fit,

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c. 16.

Sect. 57.

unless it be otherwise provided by the special act, to raise the additional sum so authorized to be borrowed, or any part thereof, by creating new shares of the company, instead of borrowing the same, or, having borrowed the same to continue at interest only a part of such additional sum, and to raise part thereof by creating new shares; but no such augmentation of capital as aforesaid shall take place without the previous authority of a general meeting of the company.

New shares
to be consid-
ered same as
original
shares.

LVII. The capital so to be raised by the creation of new shares shall be considered as part of the general capital, and shall be subject to the same provisions in all respects whether with reference to the payment of calls, or the forfeiture of shares on non-payment of calls, or otherwise, as if it had been part of the original capital, except as to the times of making calls for such additional capital, and the amount of such calls, which respectively it shall be lawful for the company from time to time to fix as they shall think fit.

If old shares
at premium
new shares
to be offered
to the share-
holders.

LVIII. If at the time of any such augmentation of capital taking place by the creation of new shares the then existing shares be at a premium, or of greater actual value than the nominal value thereof, then, unless it be otherwise provided by the special act, the sum so to be raised shall be divided into shares of such amount as will conveniently allow the same to be apportioned among the then shareholders in proportion to the existing shares held by them respectively; and such new shares shall be offered to the then shareholders in the proportion aforesaid: and such offer shall be made by letter under the hand of the secretary given to or sent by post, addressed to each shareholder according to his address in the shareholders' address book, or left at his usual or last place of abode.

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Shares to
vest in the
parties ac-
cepting;
otherwise to
be disposed
of by the
directors.

*LIX. The said new shares shall vest in and belong to the shareholders who shall accept the same, and pay the value thereof to the company at the time and by the instalments which shall be fixed by the company; and if any shareholder fail for one month after such offer of new shares to accept the same, and pay the instalments called for in respect thereof, it shall be lawful for the company to dispose of such

shares in such manner as they shall deem most for the advantage of the company.

8 & 9 VICT.
c. 16.

Sect. 60.

LX. If at the time of such augmentation of capital taking place the existing shares be not at a premium, then such new shares may be of such amount, and may be issued in such manner and on such terms as the company shall think fit.

If not at a premium, to be issued as company think fit,

Consolidation of Shares.

And with respect to the consolidation of shares into stock, be it enacted as follows:

LXI. It shall be lawful for the company from time to time, with the consent of three fifths of the votes of the shareholders present in person or by proxy at any general meeting of the company, when due notice for that purpose shall have been given, to convert or consolidate all or any part of the shares then existing in the capital of the company, and in respect whereof the whole money subscribed shall have been paid up, into a general capital stock, to be divided amongst the shareholders according to their respective interests therein.

Power to consolidate shares into stock.

LXII. After such conversion or consolidation shall have taken place, all the provisions contained in this or the special act which require or imply that the capital of the company shall be divided into shares of any fixed amount, and distinguished by numbers, shall, as to so much of the capital as shall have been so converted or consolidated into stock, cease and be of no effect, and the several holders of such stock may thenceforth transfer their respective interests therein, or any parts of such interests, in the same manner and subject to the same regulations and provisions as or according to which any shares in the capital of the company might be transferred under the provisions of this or the special act; and the company shall cause an entry to be made in some book, to be kept for that purpose of every such transfer; and for every such entry they may demand any sum not exceeding the prescribed amount or if no amount be *prescribed, a sum not exceeding two shillings and sixpence.

Proprietors of stock may transfer the same.

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LXIII. The company shall from time to time cause the names of the several parties who may be interested in any such stock as aforesaid, with the amount of the interest therein possessed by them respectively, to be entered in

Register of stock.

8 & 9 Vict.
c. 16.

Sect. 64.

Proprietors
of stock en-
titled to di-
vidends.

a book to be kept for the purpose, and to be called "The Register of Holders of Consolidated Stock;" and such book shall be accessible at all seasonable times to the several holders of shares or stock in the undertaking.

LXIV. The several holders of such stock shall be entitled to participate in the dividends and profits of the company, according to the amount of their respective interests in such stock, and such interests shall, in proportion to the amount thereof, confer on the holders thereof respectively the same privileges and advantages, for the purpose of voting at meetings of the company, qualifications for the office of directors, and for other purposes, as would have been conferred by shares of equal amount in the capital of the company, but so that none of such privileges or advantages, except in the participation in the dividends and profits of the company, shall be conferred by any aliquot part of such amount of consolidated stock as would not, if existing in shares, have conferred such privileges or advantages respectively.

Application of Capital.

LXV. That all the money raised by the company, whether by subscriptions of the shareholders, or by loan or otherwise, shall be applied, firstly, in paying the cost and expenses incurred in obtaining the special act, and all expenses incident thereto, and secondly, in carrying the purposes of the company into execution (*k*).

(*k*) If a shareholder has advanced money to procure an act of parliament for a company, and the act provides that the expense of obtaining it shall be paid out of the monies to be subscribed by virtue of the act in preference to all other payments whatsoever, he may recover such money by action the moment the company become possessed of the subscriptions so made. (*Carden v. General Cemetery Co.*, 5 Bing. N. C. 263; 7 Dowl. 275; *Tilson v. Warwick Gas Light Co.*, 4 B. & C. 962.)

Obligation
of companies
to apply
monies for
purposes de-
fined.

Companies having funds for objects which are distinctly defined by act of parliament, cannot be allowed to apply them to any other purpose whatever, however advantageous or profitable that purpose may appear to be to the *company, or to the individual members of the company.

(*Munt v. Shrewsbury and Chester Railw. Co.*, 13 Beav. 1; 8 & 9 VICT. c. 16.
15 Jur. 26; 20 L. J., Chanc., 169.)

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The managing directors of a railway company, with the view of increasing the traffic on their line, entered into a contract with a steam packet company, that they would guarantee the proprietors of the steam packet company a minimum dividend of five per cent. on their paid up capital, until the company should be dissolved, and that upon a dissolution the whole paid up capital should be returned to the shareholders in exchange for a transfer of the assets and properties of a steam packet company. One of the shareholders filed the bill on behalf of himself and all other shareholders who should contribute, except the directors, against the company and the directors, and obtained an injunction, *ex parte*, to restrain the completion of the contract: it was held, on motion to dissolve this injunction, that an objection for want of parties to a suit so framed, was not sustainable; that directors have no right to enter into or to pledge the funds of the company in support of any project not pointed out by their act, although such project may tend to increase the traffic upon the railway, and may be assented to by the majority of the shareholders, and the object of such project may not be against public policy; that acquiescence by shareholders in a project for however long a period, affords no presumption that such project is legal; that an objection stated by affidavit, and remaining unanswered, that the plaintiff was proceeding at the instigation and request of a rival company, did not deprive him of his right to an injunction, and the motion to dissolve the injunction was refused, with costs. (*Colman v. Eastern Counties Railw. Co.*, 4 Railw. C. p. 513; 11 Jur. 74; Law. J. 1847, Ch. 73; 10 Beav. 1.)

A railway company having obtained an act of parliament for the construction of a railway from London to Portsmouth, expressed an intention wholly to abandon the project, but subsequently, about one month before their powers for taking land compulsorily had expired, in consequence of an agree-

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ment with another railway company, they determined, with the assent of the majority of the shareholders present at an extraordinary general meeting convened for that purpose, to complete four miles of the railway, as far as L., and delivered notices and entered into contracts for the purchase of land required for that purpose.

The plaintiff then filed his bill on behalf of himself and other shareholders against the directors, praying an injunction.

A demurrer for want of equity was overruled, and an order for an injunction to restrain the defendants from proceeding with their works, &c., with the view of completing the line to L. only, was issued. (*Cohen v. Wilkinson*, 5 Railw. C. 741; 12 Beav. 125; 1 Mac. & G. 481; 1 Hall & T. 554.)

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In this case it was observed by Lord *Langdale*, M. R., "The company is not like a partnership for general trading *—a partnership in which one portion of the business may be encouraged and another discouraged or abandoned, according to the contingencies of trade, and in which there is a general authority to use the capital to the best advantage; but it is a partnership for a public purpose, for effecting a work which it is a duty to complete, and for which alone the capital is advanced in shares, or authorized to be raised. The obligation to complete the work appears to me to be co-extensive with the authority to [make it. Neither this act nor any of these acts contains authority to substitute a less work or part for the whole: and if the governors or directors of the company take on themselves to determine that they will not perform the whole work, but will apply the capital collected on the faith of the whole work being completed, in completing only a part of it, I am of opinion that the determination is without authority, and contrary to the provisions of the act of parliament." (*Cohen v. Wilkinson*, 5 Railw. C. 750, 751; 12 Beav. 125. See *Graham v. Birkenhead, Lancashire and Cheshire Junction Railw. Co.*, 12 Beav. 460; 2 Mac. & G. 146.)

The Shropshire Union Railways and Canal Company was authorized by three several acts, passed in 1846, to construct three separate lines of railway, and each act authorized a certain sum to be raised for the line authorized by it, declaring such sum to be part of the general capital of the company; and a subsequent act authorizing a lease of the lines to the London and North Western Railway Company, declared that the company referred to by each of the above three acts was one and the same company. It was held, on demurrer to a bill by a shareholder to restrain the construction of one only of the above lines, that the principle of *Cohen v. Wilkinson*, supra, applied; and that it was illegal to construct such line only with the funds raised under the powers of the acts of 1846. But the demurrer was allowed on the ground that the bill did not contain an allegation of the intention of the company to apply the funds for the construction of such one of the lines only, leave being given to amend. (*Hodgson v. Earl Powis*, 14 Jur. 906; 19 L. J. Chanc. 356; 12 Beav. 392, 529.)

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c. 16
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It was afterwards decided by the lords justices, overruling the decision at the rolls, that no injunction ought to be granted on an interlocutory application to restrain the amalgamated companies from making calls, or extending the works which they had already completed, as more inconvenience would arise from the court interfering than from its abstaining to do so; and on this account, as well as on the grounds of acquiescence and want of parties, the injunction was dissolved. (*Hodgson v. Earl Powis*, 15 Jur. 1022; 1 De G. M. & G. 6.)

It appeared very probable that at the time of filing of the bill, a company, which was authorized to make 150 miles of railway, intended to complete twenty-three miles only, and then abandon the rest. Upon a motion to restrain them, it appeared that the company had since abandoned the whole. *The court was of opinion that if the case had remained as it was at the time of the filing of the bill, the plaintiff would have been entitled to the injunction; but refused it, on the

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ground of the alteration in the existing circumstances, and gave no costs. (*Logan v. Earl Courtown*, 13 Beav. 22; 20 Law J. Chanc. 347.)

[168] It is improper and wrong for railway companies to embark their funds in other railway undertakings; and they have no right to engage or pledge their funds, or entangle their affairs in unauthorized transactions, upon the speculation that they may obtain parliamentary authority for doing acts which are beyond their powers at the time when they are done. (*Ib.*)

The chairman of the South-Eastern Railway Company promised the managing committee of a proposed railway company, that in consideration of their not abandoning their project and intention of applying to parliament for an act to authorize the making of the proposed line, the South-Eastern Railway Company would, in case of rejection of the scheme, insure the company, of which the plaintiffs were the managing committee, against loss which might be occasioned to such proposed railway company by such rejection and failure, and would defray and pay all expenses incurred by them in endeavoring to obtain the act. The South Eastern Railway company, by their acts, were authorized to apply their funds for certain purposes only, not including the payment of the costs of the proposed proceeding in parliament; it was held, that the agreement was void, as it was an agreement made by contracting parties (who must be presumed to have full knowledge of the powers conferred on the South Eastern Railway Company by their acts of parliament, which were public acts), that that company should do an act which was illegal, contrary to public policy and the provisions of the statutes. (*Mac Gregor v. Deal and Dover Railw. Co.*, 22 Law J. Q. B. 69, Exch. Ch.; *East Anglian Railw. Co. v. Eastern Counties Railw. Co.*, 21 Law J. C. P. 23; *Great Western Railw. Co. v. Rushout*, 5 De G. & S. 290.)

A bill having been filed against directors by one of the shareholders on behalf of himself and the other shareholders alleging improper conduct on the part of the directors, and praying an account and repayment of deposits, the proceedings

were stayed on payment to the plaintiff of his deposit. (*Scarth v. Chadwick*, 14 Jer. 300; 19 L. J. Chanc. 327.) (1)

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c 16
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(1) Two shareholders in an incorporated railway company, suing on behalf of themselves and all others, sought to restrain the company from applying their funds in completing a branch Railway for the construction of which, their parliamentary powers had expired.

An interlocutory application for an injunction was refused on the grounds that one of the plaintiffs named had acquiesced in the acts complained of; that the injunction would cause considerable inconvenience, that as all the land had been purchased, it was not clear, that it was illegal to complete the line, and that the suit was not properly framed, being on behalf of all the shareholders, which would include those who had sanctioned the acts sought to be restrained.

The rule, that the majority cannot bind the minority in a joint stock company, as to acts not contemplated by the common contract has not been applied to corporate companies for a public undertaking involving public interests and duties under the sanction of Parliament. *Efook's v. the London and South Western Railway Co.*, 19 Eng. Law and Eq. 7.

General Meetings.

And with respect to the general meetings of the company, and the exercise of the right of voting by the shareholders, be it enacted as follows;

LXVI. The first general meeting of the shareholders of the company shall be held within the prescribed time, or if no time be prescribed, within one month after the passing of the special act, and the future general meetings shall be held at the prescribed periods, and if no periods be prescribed, in the months of February and August in each year, or at such other stated periods as shall be appointed for that purpose by an order of a general meeting; and the meetings so appointed to be held as aforesaid shall be called "Ordinary Meetings;" and all meetings, whether ordinary or extraordinary, shall be held in the prescribed place, if any, and if no place be prescribed, then at some place to be appointed by the directors.

Ordinary
meetings to
be held half-
yearly.

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c. 16

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Business at
ordinary
meetings.

Right of
shareholders
to control
acts of the
directors.

LXVII. No matters, except such as are appointed by this or the special act to be done at an ordinary meeting, shall be transacted at any such meeting, unless special notice of such matters have been given in the advertisement convening such meeting (*l*).

(*l*) Where a simple agreement and nothing more is made and some resolutions have been come to by the directors which only affect the company itself, those who did approve it at one meeting may, by a transmission of their shares to other persons, give to such persons a right to object to what has been before done.

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Where it appeared that seven out of ten directors of a company were about to proceed in opposition to the wishes of a majority of the shareholders as declared at a meeting, and a bill had been filed by the authority of the remaining three directors on behalf of the company, to prevent the directors from so proceeding on a motion to take the bill off the file, as filed on insufficient authority, the court allowed the motion to stand over, in order to ascertain the sense of the shareholders as to the bill. (*Exeter & Crediton Railw. Company v. Buller*, 11 Jur. 527, 532; Law J. 1847, Chanc. 449; 5 Railw. C. 211.)

An injunction having been obtained to restrain the directors from so proceeding, and it appearing from the answer that the act had been obtained for one object, which the seven directors were now proceeding to carry out, but that a majority of the shares having been purchased by new shareholders, who were alleged to be under the control of another railway company, the present majority of shareholders had other objects and opposed the proceedings of the seven directors, a motion to dissolve the injunction was refused with costs. (*Ib.*)

Where, however, directors using the authority sanctioned according to the mode prescribed by the act of parliament, by more than three-fifths of the body, have entered into such an engagement as necessarily, has produced the effect

of implicating *third parties*, by placing them in a situation which but for the agreement, they would not have placed themselves, it is not competent for persons who newly become the purchasers of shares to do any thing more than to purchase the shares *cum onere* of performing the antecedent *agreement entered into by the company to which the shares belong.

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The Great Western Railway Company entered into an agreement with two other companies, A. and B. (which agreement was sanctioned by three-fifths of the shareholders of the A. and B. companies), to purchase their lines, under a power of sale contained in their acts; and it was a term of that agreement that the A. and B. companies should apply to parliament for powers to amalgamate their lines, and that the directors of the Great Western Railway should have certain powers as to the manner of making the lines, and controlling the expenditure. In consequence of the transfer of shares to persons not favorable to this agreement, resolutions were afterwards passed, by which it appeared that it was the desire of the majority of the then shareholders of the A. and B. companies to repudiate the agreement with the Great Western Railway Company, and they refused to make the application to parliament, and to oppose it if made by the directors pursuant to the agreement.

The Great Western Railway Company then filed a bill for the specific performance of the agreement, and at the same time applied for an injunction to restrain the dissentient shareholders of the A. and B. companies from entering into any agreement with any other company, or doing any act in violation of their original agreement.

It was held, by Lord *Cottenham*, C., affirming the judgment of *Shadwell*, V. C., that there was a sufficient case shown by the bill, to support it against a demurrer for want of equity.

That an agreement to apply to parliament, for powers to do something, not included in a particular act, is such an agreement as the court will recognise, to the extent of com-

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Sec 67.

pellling the parties to keep matters in *statu quo*, until the application to parliament shall be made.

That an agreement, not in itself invalid, made by the majority of the shareholders, cannot be rescinded by resolutions passed by persons afterwards becoming shareholders, although they may then constitute the majority. (*Great Western Railw. Co. v. Birmingham & Oxford Junction Railway Co.*, 5 Railw. C., 241 ; 2 Phill. C. C. 597.)

At a meeting of a company, regularly convened, resolutions were passed removing certain directors for misconduct; the deed of the company providing that such a meeting might remove any director for "negligence, misconduct in office, or any other reasonable cause." Other directors were subsequently elected in their place. A bill was then filed by the removed directors, to set aside the proceedings of the meeting and the election of the new directors.

It was held on a motion for an injunction to restrain the new directors from acting, that the expression "reasonable cause" in the company's deed, did not refer to such a cause as in a court of justice would be held reasonable, but only to such a cause as should be deemed reasonable by the shareholders* assembled at a meeting duly convened; and therefore that the court had no jurisdiction to interfere, nor where no case of direct fraud was proved, to determine whether the decision of the meeting had or had not been unduly influenced by unfounded statements, made by persons taking an active part in the proceedings. (*Inderwick v. Snell*, 2 Mac. & G., 216; 2 Hall & T., 412; 14 Jur. 727; 19 L. J., Chanc. 542.)

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Obligation of
company to
apply funds
for purposes
directed by
act.

A railway company is bound to apply all its monies and property for the purposes directed and provided for by the act of parliament, and not for any other purposes whatever. Any application of or dealing with the capital, funds, or money in any manner not distinctly authorized by the act is illegal, and where directors, for purposes not authorized by the act, are proceeding to involve the company or sharehold-

ers in liabilities to which they never consented, relief may and ought to be given in the court of chancery. In such a case, one shareholder may sue on behalf of himself and the other shareholders. A railway company became lawfully possessed of shares in another independent railway company, it was held that having no authority to do so by their act of parliament, they could not legally, as against one dissentient shareholder, increase their number of such shares, or apply their funds for the support of the second company. (*Salomons v. Laing*, 12, Beav. 339 ; 14 Jur. 279 ; 19 L. J., Chanc., 225 ; 6 Railw. C., 289, 303.)

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A railway company, constituted under an act of parliament, agreed with two other railway companies that the whole concern, without incumbrance, when completed, should be worked by those two companies, who should have perfect control and exercise all the rights of the first-mentioned company, and who should find stock and work the concern for twenty-one years: it was held, that the agreement was illegal, as being in violation of the act under which the first-mentioned company was constituted ; and that, though a very large majority of the shareholders present at a meeting had sanctioned the agreement, the dissentients might file a bill, on behalf of themselves and the other shareholders, against the company and its directors, to have it declared void. (*Beman v. Rufford*, 1 Sim. N. S. 550 ; 15 Jur. 914 ; 20 L. J., Chanc., 537.)

A bill was filed by a shareholder, on behalf, &c., to prevent the directors making a part only of the railway, abandoning the rest, and for an indemnity. There were several classes of shareholders. It was held, that it was not necessary that the several classes should be severally and separately represented on the record. (*Dumville v. Birkenhead &c., Junction Railway Company*, 12 Beav. 444.)

There were two railway companies, A. and B. A shareholder in A. filed his bill on behalf, &c., against the companies A and B. ; and the directors of the two companies complaining, first, that the directors of A. had illegal-

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ly invested the funds in shares in B., and secondly, of a separate transaction, whereby the capital of A. had been advanced *to B. upon an arrangement not authorised, and praying for relief against the several directors; it was held, that the bill was multifarious. (*Salomons v. Laing*, 12 Beav. 339; 14 Jur. 279; 19 L. J., Chanc., 225; 6 Railw. C.. 289.)

The bill in this case having been amended it was decided, that, where one company enters into an illegal transaction with another company, and makes an illegal payment out of their funds in respect of such transaction, a shareholder impeaching the dealings of the companies and seeking to have the money restored to the funds of his own company, is entitled in his own name to maintain a suit against both companies for that purpose. A company is presumed to know the extent of the legal powers of another company with whom they are dealing, and the company are properly made defendants to a suit in respect of such dealings, although the bill seeks to make the directors personally liable. *Salomons v. Laing*, 6 Railw. C. 203.)

This case in substance was, that the Brighton Railway Company, having in their hands certain monies, which were applicable to one purpose only—to the performance of one particular trust, and no other—and having powers given to them by act of parliament in consideration of their engagement to apply these monies for the purposes of their act, instead of so applying them, pay them to the Portsmouth Company for another and quite a different purpose. On the other hand, the Portsmouth Company had full notice of the only legal purpose for which those monies could be applied, and having that notice, they nevertheless, did avowedly receive the monies for the purpose of applying it to the illegal purpose, for which it was expressly paid to them. In such case, both companies were guilty of fraud against the legislature, who gave them their powers for purposes entirely different from those which they were exercising, and became guilty of the same breach of trust; the one in paying, and the other in receiving, for a known illegal

purpose. The Portsmouth Company were therefore properly made parties to a suit, seeking a declaration of rights and the recovery of the monies, which the latter company had received with a knowledge that they were trust monies. And it was held, that the rule that an individual cannot sue on behalf of himself and others, where there is an injury done to the whole corporation, without having first made the attempt to get the concurrence of that corporation, was not applicable to this case. (*Salomons v. Laing*, 6 Railw. C. 303; 12 Beav. 339, 377.)

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c. 16.
Sect. 67.

The proprietor of a scrip certificate, whether registered or not (such proprietor not being in default,) may sue on behalf of himself and all other proprietors of like certificates, and of the stock which they represent, or into which they are convertible, where the proprietors of certificates and stock are numerous, there being no incompatibility in the interest of the registered and unregistered proprietors to preclude the plaintiff from representing both classes of persons.

The Eastern Union Railway Company was authorized by [*173] several acts of parliament to make railways from Colchester to Ipswich, Ipswich to Bury St. Edmonds and Norwich, and from Norwich to Harwich; and, for those purposes, to raise monies by shares and loans, not exceeding certain sums in the whole. The same company was also, by a distinct act, authorized to purchase and complete the Hadleigh Junction Railway, and, for that purpose, by shares or loan, to raise a sum not exceeding 100,000*l*. In a suit brought by the proprietor of a scrip certificate for stock, forming part of the capital raised in pursuance of the acts authorizing the company to purchase the Hadleigh Junction Railway, and make the Harwich line, charging that the company was about to misapply such money in the construction of the Norwich line, and seeking to restrain such misapplication, the demurrers of the company and the directors for want of equity, were overruled. (*Bagshaw v. Eastern Union Railw. Co.*, 6 Railw. C. 152; 2 Hall & T. 201; 14 Jur. 491; 19 L. J. Chan. 410; 2 Mac. & G. 389.)

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A shareholder in an incorporated railway company filed a bill on behalf of himself and other shareholders, to restrain the directors from issuing preference shares, on the ground that they were about to be issued contrary to the company's acts, and for the purpose of constructing the original line instead of the branch (for which alone additional shares were to be created,) and were intended to be distributed in a manner contrary to the directions of the act, which authorized the creation of additional shares; the bill filed on the 22d of September, stated that the plaintiff, on the 17th of September, became aware of the resolutions passed on the 12th of September, under which the preference shares were to be offered to the shareholders and on the 23d of September, but the bill did not otherwise show that the plaintiff had not the means of procuring a suit to be instituted in the name of the corporation: it was held, on the demurrers of the corporation and of the directors to the bill, that these demurrers could not be overruled consistently with the principle stated in, or to be extracted from *Mozley v. Alston* (1 Ph. C. C. 190,) *post* and *Exeter and Crediton Railw. Co. v. Buller*, (5 Railw. C. 211,) *ante*, whether the proceedings sought to be restrained were legal or not. (*Edwards v. the Shrewsbury and Birmingham Railw. Co.*, 2 De G. & S. 537.)

On the bill being amended, and stating that a majority of the shareholders supported the views of the directors, and refused to authorize the plaintiff, or any other person to institute a suit in the name of the company: it was held, allowing a demurrer that it was still within the influence of the above authorities. (*Ib.*)

The corporation and the directors having demurred separately, the court refused to give costs of more than one demurrer. (*Ib.*)

It seems that there is not sufficient precision in the class purported to be represented by a plaintiff who sues on behalf of himself, and all other the shareholders in an incorporated company, "except such of the said shareholders as

are respectively *represented by those shareholders herein-
after named defendants." (*Ib.*)

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c. 16.
Sect. 67.

A railway communicated with a river upon the banks of which the company were empowered to erect wharfs &c., and take tolls. The navigation of the river having become deteriorated, the company were about to support a bill for improving it. An injunction was granted to restrain the application of the funds of the company towards that object. (*Munt v. Shrewsbury and Chester Railw. Co.*, 13 Beav. 1, 15 Jur. 26; 20 L. J. Chanc. 169.)

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An injunction to restrain the defendants from entering into an agreement with another railway company, which would be a violation of or inconsistent with a subsisting agreement between the plaintiffs and the defendants, was refused; the inconvenience to arise from granting the injunction being greater than the inconvenience to arise from refusing it. (*Shrewsbury and Chester v. Shrewsbury and Birmingham Railw. Co.*, 1 Sim. N. S. 410; 15 Jur. 548; 20 L. J. Chanc. 574.)

A railway and Canal company were formed by the union of several ancient canals and three railway companies, and power was given to the united company to reissue new shares for the purpose of raising capital. A large debt was due, before the act of union, from one of the canal companies, and in pursuance of a resolution passed at a general meeting, a call was made on the shareholders of the united companies for paying it off. Some of the shareholders in the new company having objected to this application of the monies to be raised under the new act, and alleging that it would prevent the construction of the railway at all, filed a bill for an injunction to restrain the directors from enforcing a call, or applying any of the funds in their hands for the purpose of paying the debt. The court allowed a demurrer for want of equity, on the ground that the bill did not represent any misapplication of the money to be raised, for it appeared to be neither more nor less than paying off an incumbrance upon the property which belonged to the company by the opera-

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c 16.
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tion of the acts, and was to be made applicable to the scheme. (*Cooper v. Shropshire Union Railw. and Canal Co.*, 6 Railw. C. 136.)

In a railway company there were two classes of shareholders. A general meeting authorized the directors to apply to parliament for an act, which would very materially alter the existing rights and interests of the two classes, inter se: it was held, that such an application was not a breach of trust or duty, and that to hold otherwise would be applying too strictly to a railway company the principles admitted to be applicable to private partnerships, resting on private contracts unconnected with public duties and interests, and capable of dissolution. (*Stevens v. South Devon Railw. Co.*, 13 Beav. 48; 15 Jur. 235; 20 L. J. Chanc. 491.)

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Upon the application of a shareholder of one of such two classes for an injunction to restrain the application to parliament, *and the use of the corporate seal and the application of the corporate funds for that purpose, the court refused to restrain the application to parliament, or the use of the corporate seal for that purpose; but restrained the application of the funds and monies of the company towards the payment of the costs. (*Id.*)

Extraordinary meetings.

LXVIII. Every general meeting of the shareholders, other than an ordinary meeting, shall be called an "Extraordinary Meeting;" and such meetings may be convened by the directors at such times as they think fit.

Business at extraordinary meetings.

LXIX. No extraordinary meeting shall enter upon any business not set forth in the notice upon which it shall have been convened.

Extraordinary meetings may be required by shareholders.

LXX. It shall be lawful for the prescribed number of shareholders, holding in the aggregate shares to the prescribed amount, or, where the number of shareholders or amount of shares shall not be prescribed, it shall be lawful for twenty or more shareholders holding in the aggregate not less than one tenth of the capital of the company, by writing under their hands, at any time to require the directors to call an extraordinary meeting of the company; and such requisition shall fully express the object of the meeting required

to be called, and shall be left at the office of the company, or given to at least three directors, or left at their last or usual places of abode; and forthwith upon the receipt of such requisition the directors shall convene a meeting of the shareholders; and if for twenty-one days after such notice the directors fail to call such meeting, the prescribed number, or such other number as aforesaid of shareholders qualified as aforesaid, may call such meeting, by giving fourteen days public notice thereof.

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c. 16.
Sect. 71.

LXXI. Fourteen days public notice at the least of all meetings, whether ordinary or extraordinary, shall be given by advertisement, which shall specify the place, the day, and the hour of meeting; and every notice of an extraordinary meeting, or of an ordinary meeting, if any other business than the business hereby or by the special act appointed for ordinary meetings is to be done thereat, shall specify the purpose for which the meeting is called (*m*),

Notice of
meetings.

(*m*) In answer to an action for calls, it was pleaded that the call was not made by any persons having authority on behalf of the company to make it. By the Swansea Dock Act, passed in July, 1847, certain persons were named as directors, who subsequently resolved that the principal place of business should be Swansea. On the 5th of October, at a meeting of some of the directors held in London, it having been then resolved to call an extraordinary general meeting of the company, to be held in London on the 20th of October, a notice was, on the 5th of October, inserted in the third edition of the Sun newspaper, published and circulated in London on that day, and calling a meeting of the company in London on the 20th of October. At the meeting held on the 20th of October, the directors appointed in July were discharged, others being appointed. There was no evidence to shew that the third edition of the Sun newspaper of the 5th of October ever reached Swansea. On the 21st of October, 1847, and on the 31st of January, 1848, meetings of shareholders were held at Swansea, when the number of directors were reduced to nine; and on the 10th of February, 1848, three of those directors made the calls in question: it

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was held, that as it was not proved that the Sun newspaper of the 5th of October reached Swansea, the notice was bad ; and the meeting of the 20th of October, which discharged the directors by whom the calls were afterwards made was invalid, and consequently the call was good. (*Swansea Dock Co. v. Levien*, 20 L. J. Exch. 447. See s. 138, *post*.)

Quorum for
a general
meeting.

LXXII. In order to constitute a meeting (whether ordinary or extraordinary) there shall be present, either personally or by proxy, the prescribed quorum, and if no quorum be prescribed then shareholders holding in the aggregate not less than one twentieth of the capital of the company, and being a number not less than one for every five hundred pounds of such required proportion of capital, unless such number would be more than twenty, in which case twenty shareholders, holding not less than one twentieth of the capital of the company, shall be the quorum; and if within one hour from the time appointed for such meeting the said quorum be not present no business shall be transacted at the meeting, other than the declaring of a dividend, in case that shall be one of the objects of the meeting, but such meeting shall, except in the case of a meeting for the election of directors, hereinafter mentioned, be held to be adjourned *sine die*.

Chairman at
general
meetings.

LXXIII. At every meeting of the company one or other of the following persons shall preside as chairman ; that is to say, the chairman of the directors, or in his absence the deputy chairman (if any), or in the absence of the chairman and deputy chairman some one of the directors of the company to be chosen for that purpose by the meeting, or in the absence of the chairman and deputy chairman and of all the directors, any shareholder to be chosen for that purpose by a majority of the shareholders present at such meeting.

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Business at
meetings and
adjourn-
ments.

LXXIV. The shareholders present at any such meeting shall proceed in the execution of the powers of the company with respect to the matters for which such meeting shall have been convened, and those only ; and every such meeting may be adjourned from time to time, and from place to place ; and no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which such adjournment took place.

LXXV. At all general meetings of the company every shareholder shall be entitled to vote according to the prescribed scale of voting, and where no scale shall be prescribed every shareholder shall have one vote for every share up to ten, and he shall have an additional vote for every five shares beyond the first ten shares held by him up to one hundred, and an additional vote for every ten shares held by him beyond the first hundred shares; provided always, that no shareholder shall be entitled to vote at any meeting unless he shall have paid all the calls then due upon the shares held by him.

8 & 9 Vict.
c. 16
Sect. 75.

Votes of
shareholders.

LXXVI. The votes may be given either personally or by proxies, being shareholders, authorized by writing according to the form in the schedule (F.) (*m*) to this act annexed, or in a form to the like effect, under the hand of the shareholder nominating such proxy, or if such shareholder be a corporation, then under their common seal; and every proposition at any such meeting shall be determined by the majority of votes of the parties present, including proxies, the chairman of the meeting being entitled to vote, not only as a principal and proxy, but to have a casting vote if there be an equality of votes (*n*).

Manner of
voting.

(*m*) See Form in the Appendix.

(*n*) By 7 & 8 Vict. c. 21, schedule, a duty of two shillings and sixpence is imposed for and in respect of every letter or power of attorney or other instrument made for the sole purpose of appointing or nominating a proxy to vote at any meeting of the proprietors or shareholders of or in any joint stock company or other company or society, whose stocks or funds are divided into shares and transferable. The 6th section of the same act enacts, that any letter or power of attorney or other instrument appointing or nominating a proxy, and chargeable with duty under that act, shall authorize such proxy to vote upon any matter at one meeting of the proprietors or shareholders of or in any company or society, the time of holding whereof shall be specified in such instrument, or at any adjournment of such meeting; and no such letter or power of attorney or other instrument shall be *further or otherwise available. By the 7th section the commissioners of stamps are prohibited

Stamps on
proxy.

[*178]

8 & 9 VICT. c. 16.
Sect. 76. from stamping instruments appointing proxies, and a penalty of fifty pounds is imposed on any person making or signing any letter of attorney or other instrument appointing a proxy or on any person voting or attempting to vote as a proxy, in pursuance of or under the authority, or pretended authority, of any such letter or power of attorney not duly stamped; and every vote made or given or other act done in pursuance or under the authority or pretended authority of any such letter or power of attorney or other instrument, not duly stamped, shall be absolutely null and void to all intents and purposes.

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By the Hull Dock Act (7 & 8 Vict. c. 103), which received the royal assent two months after the 7 & 8 Vict. c. 21, it was enacted that it should be lawful for the plaintiffs to depute and appoint any one of the elder brethren, by writing under their common seal, to represent the said guild or brotherhood at all meetings of the Dock company, and to vote at such meetings as the proxy of the said guild, &c.: it was held, first, that the stat. 7 & 8 Vict. c. 21, refers only to those letters or powers of attorney which are proxies, whereon the duty of two shillings and sixpence is granted by that act, that is, which are proxies to vote at one particular meeting only of a joint stock company, or any adjournment thereof; and that it does not refer to more general powers of attorney which will still be subject to a stamp of thirty shillings, under the stat. 55 Geo. 3, c. 184. (*Trinity House at Hull v. Beadle*, 13 Jur. 557; 18 L. J. Q. B. 78; 13 Q. B. 175.)

It was held, secondly, that an instrument under the seal of the plaintiffs, following the terms of the Dock Act, that is, empowering W. C. to represent the plaintiffs at all meetings of the Dock company, and to vote for them as a proxy at all such meetings, is in the nature of a general power of attorney, and is therefore a valid instrument, notwithstanding the stat. 7 & 8 Vict. c. 21; and that such an instrument entitled the nominee of the plaintiffs to vote at all meetings of the dock company. (*Ib.*)

Regulations
as to proxies.

LXXVII. No person shall be entitled to vote as a proxy unless the instrument appointing such proxy have been trans-

mitted to the secretary of the company the prescribed period, or, if no period be prescribed, not less than forty-eight hours before the time appointed for holding the meeting at which such proxy is to be used.

8 & 9 VICT.
c. 16
Sect. 78.

LXXVIII. If several persons be jointly entitled to a share, the person whose name stands first in the register of shareholders as one of the holders of such share shall, for the purpose of voting at any meeting be deemed the sole proprietor thereof; and on all *occasions the vote of such first named shareholder, either in person or by proxy, shall be allowed as the vote in respect of such share, without proof of the concurrence of the other holders thereof.

Votes of joint
shareholders.

[*179]

LXXIX. If any shareholder be a lunatic or idiot, such lunatic or idiot may vote by his committee; and if any shareholder be a minor he may vote by his guardian or any one of his guardians; and every such vote may be given either in person or by proxy.

Votes of lunatics and
minors, &c.

LXXX. Whenever in this or the special act the consent of any particular majority of votes at any meeting of the company is required in order to authorize any proceeding of the company, such particular majority shall only be required to be proved in the event of a poll being demanded at such meeting; and if such poll be not demanded, then a declaration by the chairman that the resolution authorizing such proceeding has been carried, and an entry to that effect in the book of proceedings of the company shall be sufficient authority for such proceeding, without proof of the number or proportion of votes recorded in favor of or against the same.

Proof of a
particular
majority of
votes only
required in
the event of
a poll being
demanded.

Appointment and Rotation of Directors.

And with respect to the appointment and rotation of directors, be it enacted as follows :

LXXXI. The number of directors shall be the prescribed number.

Number of
directors.

LXXXII. Where the company shall be authorized by the special act to increase or to reduce the number of the directors it shall be lawful for the company from time to time, in general meeting, after due notice for that purpose, to increase or reduce the number of the directors within the prescribed limits, if any, and to determine the order of rotation in which such

Power to
vary the
number of
directors.

8 & 9 Vict.
c 16.

Sect. 83.

Election of
directors.

reduced or increased number shall go out of office, and what number shall be a quorum at their meetings.

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LXXXIII. The directors appointed by the special act shall unless thereby otherwise provided, continue in office until the first ordinary meeting to be held in the year next after that in which the special act shall have passed; and at such meeting the shareholders present personally or by proxy may either continue in office the directors appointed by the special act, or any number of them, or may elect a new body of directors, or directors to supply the places of those not continued in office, the directors appointed by the special *act being eligible as members of such body; and at the first ordinary meeting to be held every year thereafter the shareholders present, personally or by proxy, shall elect persons to supply the places of the directors then retiring from office, agreeably to the provisions herein-after contained; and the several persons elected at any such meeting, being neither removed nor disqualified, nor having resigned, shall continue to be directors until others are elected in their stead, as hereinafter mentioned.

Existing
directors
continued on
failure of
meeting for
election of
directors.

LXXXIV. If any meeting at which an election of directors ought to take place the prescribed quorum shall not be present within one hour from the time appointed for the meeting no election of directors shall be made, but such meeting shall stand adjourned to the following day at the same time and place; and if at the meeting so adjourned the prescribed quorum be not present within one hour from the time appointed for the meeting the existing directors shall continue to act and retain their powers until new directors be appointed at the first ordinary meeting of the following year (o).

(o) This section is applied mutatis mutandis to auditors, section 105.

Qualification
of directors.

LXXXV. No person shall be capable of being a director unless he be a shareholder, nor unless he be possessed of the prescribed number, if any, of shares; and no person holding an office or place of trust or profit under the company or interested in any contract with the company, shall be ca-

pable of being a director ; and no director shall be capable of accepting any other office or place of trust or profit under the company, or of being interested in any contract with the company, during the time he shall be a director (*p*).

8 & 9 Vict.
c. 16
Sect. 85.

(*p*) Some of the directors of the Sheffield and Manchester Railway Act, 7 Will. 4, c. xxi., by whom the resolutions for the calls were made, were members of a banking company, who were the bankers and treasurers of the railway company, and as such received and gave receipts for calls, and paid checks drawn by the directors, &c. A clause of the act of parliament (sect. 150) enacted, that no person concerned or interested in any contract with the company should be capable of being chosen a director ; and that if any director should directly or indirectly be concerned in any contract with the company he should thereupon be immediately and was thereby discharged from the direction. It was held, that this clause applied only to contracts made with the *company in prosecution of its enterprize, and did not disqualify the directors above mentioned. (*Sheffield, Ashton-under-Line and Manchester Railw. Co. v. Woodcock*, 7 Mees. & W. 574 ; 2 Railw. C. 522.) Where the qualification a party to act as a director of a company consists in his being the proprietor of a certain number of shares, the qualification will not be lost by a mortgage of these shares. (*Cumming v. Prescott*, 2 Y. & Coll. 488.) Neither the bankruptcy or absence of a director will necessarily put an end to his character of director, unless it be so provided by the deed of settlement. (*Phelps v. Lyle*, 10 Ad. & E. 113.) [*181]

It seems that spiritual persons holding any cathedral prebend, benefice, curacy or lectureship, or who shall be licensed or allowed to perform the duties of any ecclesiastical office whatever, will incur the penalty of the stat. 1 & 2 Vict. c. 106, by acting as a director, provisional director or member of the provisional committee of a railway company, or by personally interfering in the management of the affairs of such company. It seems however that contracts respect-

Spiritual persons acting as directors, &c.

8 & 9 Vict.
c. 16
Sect. 85.

No spiritual person benefited or performing ecclesiastical duty shall engage in trade, or buy to sell again for profit or gain.

ing the company will not be rendered illegal by the circumstance of being made by or with spiritual persons so acting, (1 & 2 Vict. c. 106, s. 31; 4 & 5 Vict. c. 14, s. 1.) See *Hall v. Franklin*, 3 Mees. & W. 259, which decided on the stat. 57 Geo. 3, c. 99, now repealed, that all contracts entered into by a joint stock banking company may be nullified if there was a clergyman of the church of England among its members. It shall not be lawful for any spiritual persons holding any such cathedral preferment, benefice [the 124 section of the act defines the terms "cathedral preferment" and "benefice"], curacy or lectureship, or who shall be licensed or allowed to perform such duties as aforesaid (i. e. the duties of any ecclesiastical office whatever, s. 28) by himself or by any other for him or to his use, to engage in or carry on any trade or dealing for gain or profit, or to deal in any goods, ware or merchandize, with certain exceptions mentioned in the act; but in none of the foregoing excepted cases shall it be lawful for such spiritual person to act as a director or managing partner, or to carry on such trade or dealing as aforesaid in person. (1 & 2 Vict. c. 106, ss. 29. 30.)

No copartnership or contract to be illegal by reason of spiritual persons being members.

The statute 4 & 5 Vict. c. 14, provides, that no such association or copartnership for banking purposes and other trades and dealings, for gain and profit, nor any contract either as between the members, partners or shareholders composing such association or copartnership for the purpose thereof, or as between such association or copartnership and other persons, shall be deemed to be illegal or void, or to occasion any forfeiture whatsoever, by reason only of any spiritual person being or having been a member, partner or shareholder of or otherwise interested in the same; but all such associations and copartnerships shall have the same validity, and all such contracts shall and may be enforced in the same manner, as if no such spiritual person had been or was a member, partner, or shareholder of or interested in such association or copartnership: provided always, *that it shall not be lawful* for any spiritual person holding any

cathedral preferment, benefice, curacy or lectureship or who shall be licensed or allowed to perform the duties of any ecclesiastical office, *to act as a director or managing partner, or to carry on trade* or such dealing as aforesaid in person. (4 & 5 Vict. c. 14, s. 1.)

8 & 9 Vict.
c. 16

Sect. 86.
No spiritual
person to act
as director.

LXXXVI. If any of the directors at any time subsequently to his election accept or continue to hold any other office or place of trust of profit under the company, or be either directly or indirectly concerned in any contract with the company, or participate in any manner in the profits of any work to be done for the company, or if such director at any time cease to be a holder of the prescribed number of shares in the company, then in any of the cases aforesaid the office of such director shall become vacant, and thenceforth he shall cease from voting or acting as a director (q).

Cases in
which office
of director
shall become
vacant.

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(q) As to the authentication of the transmission of shares in consequence of the bankruptcy or insolvency of shareholders, see *ante*, s. 18, p. 117.

Under the 85 and 86 sections of the Companies Clauses Consolidation Act, a contract by a director with the Company, after his election, is not rendered void, but the office only of a director is vacated. (*Foster v. Oxford, Worcester &c., Railway Company*, 17 Jur. 167; 22 Law. J. C. P. 99.)

LXXXVII. Provided always that no person, being a shareholder or member of any incorporated joint stock company, shall be disqualified or prevented from acting as a director by reason of any contract entered into between such joint stock company and the company incorporated by the special act; but no such director, being a shareholder or member of such joint stock company, shall vote on any question as to any contract with such joint stock company.

Shareholder
of an incor-
porated joint
stock com-
pany not dis-
qualified by
reason of con-
tracts.

LXXXVIII. The directors appointed by the special act, and continued in office as aforesaid, or the directors elected to supply the places of those retiring as aforesaid, shall, subject to the provision hereinbefore contained for increasing or reducing the number of directors, retire from office at the times and in the proportions following, the individuals to

rotation of
directors.

8 & 9 VICT. c 16.
Sect. 89. retire being in each instance determined by ballot among the directors, unless they shall otherwise agree; (that is to say,)

At the end of the first year after the first election of directors the prescribed number, and if no number be prescribed one third of such directors, to be determined by ballot among themselves, unless they shall otherwise agree, shall go out of office:

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At the end of the second year the prescribed number, and if no number be prescribed one-half of *the remaining number of such directors, to be determined in like manner, shall go out of office:

At the end of the third year the prescribed number, and if no number be prescribed the remainder of such directors shall go out of office:

And in each instance the places of the retiring directors shall be supplied by an equal number of qualified shareholders; and at the first ordinary meeting in every subsequent year the prescribed number, and if no number be prescribed one third of the directors, being those who have been longest in office, shall go out of office, and their places shall be supplied in like manner; nevertheless every director so retiring from office may be re-elected immediately or at any future time, and after such re-election shall, with reference to the going out by rotation, be considered as a new director: provided always, that if the prescribed number of directors be some number not divisible by three, and the number of directors to retire not prescribed, the directors shall in each case determine what number of directors, as nearly one-third as may be, shall go out of office, so that the whole number shall go out of office in three years.

Supply of
occasional
vacancies in
office of di-
rectors.

LXXXIX. If any director die, or resign, or become disqualified or incompetent to act as a director, or cease to be a director by any other cause than that of going out of office by rotation as aforesaid, the remaining directors, if they think proper so to do, may elect in his place some other shareholder, duly qualified to be a director; and the shareholder so elected to fill up any such vacancy shall continue in office as a director so long only as the person in whose

place he shall have been elected would have been entitled to continue if he had remained in office (r).

8 & 9 VICT.
c. 16.
Sect. 90.

(r) If any party is dissatisfied with the company because there is not the full number of directors, he may apply for a mandamus to have the number completed. (*Thames Haven Dock Co. v Rose*, 4 Man. & G. 559; 2 Dowl. N. S. 104.) See *post*, note on Mandamus.

Certain shareholders of a joint stock company, by deed appointed a committee to do certain acts. The deed contained a proviso, that, in case any member of the company should die, or decline, or desire to be discharged from acting, or become incapable to act as a member of the committee, the others should have power to nominate another in his stead. One of the committee absconded to America under circumstances strongly evidencing no intention to return: it was held that thereby he became incapable to act within the meaning of the deed. (*Wilson v. Wilson*, 6 Scott, 540; S. C. nom. *Wilson v. Butler*, 4 Bing. N. C. 748.)

*Powers of Directors.

[*184]

And with respect to the powers of the directors, and the powers of the company to be exercised only in general meeting, be it enacted as follows:

XC. The directors shall have the management and superintendence of the affairs of the company, and they may lawfully exercise all the powers of the company, except as to such matters as are directed by this or the special act to be transacted by a general meeting of the company, but all the powers so to be exercised shall be exercised in accordance with and subject to the provisions of this and the special act; and the exercise of all such powers shall be subject also to the control and regulation of any general meeting specially convened for the purpose, but not so as to render invalid any act done by the directors prior to any resolution passed by such general meeting (s).

Powers of
the company
to be exer-
cised by the
directors.

(s) Where by the act of incorporation of a railway company the directors were empowered to appoint and displace

8 & 9 Vict. c. 16
Sect. 91. any of the officers of the company, it was held, that the appointment of an attorney the company need not be under seal; therefore, that a notice of appeal against a poor-rate, signed by the attorneys of the company appointed by the directors, was sufficient. (*Reg. v. J. of Cumberland*, 5 Railw. C. 332; 5 D. & L. 431.)

Powers of
the company
not to be ex-
ercised by
the directors.

XCI. Except as otherwise provided by the special act, the following powers of the company (that is to say), the choice and removal of the directors, except as hereinbefore mentioned, and the increasing or reducing of their number where authorized by the special act, the choice of auditors, the determination as to the remuneration of the directors, auditors, treasurer, and secretary, the determination as to the amount of money to be borrowed on mortgage, the determination as to the augmentation of capital, and the declaration of dividends, shall be exercised only at a general meeting of the company (t).

(t) At a general meeting of the shareholders of a railway completely registered, a resolution was passed, "that the directors be and are hereby authorized to borrow on mortgage bond or otherwise, such sums for such period, and at such rates of interest as they may deem expedient in accordance with the provisions of the deed of settlement and act of parliament." The 29th section of 7 & 8 Vict. c. 110, requires any contract or dealing between a company and any director (except as therein mentioned) to be submitted to a meeting of shareholders. At a meeting of the directors, *three of that body offered to advance a sum of money on the security of the calls and of the property of the company. The company thereupon gave authority to the bankers to hold all sums paid on account of calls to the credit of the lenders; but before all the sums advanced had been paid, the company withdrew that authority. The bankers then filed their bill praying an account, a receiver and payment of their balance. To this bill the company put in a general demurrer for want of equity, which was allowed, with liberty to amend. It not being alleged that the agreement for a

*185]

loan had been submitted to a general meeting of the shareholders in accordance with the 29 s. 7 & 8 Vict. c. 110, and therefore the contract was invalid. (*Feversham v. Cameron's Steam Coal and Railw. Co.*, 5 Railw. C. 492; 2 De G. & S. 296; 18 Law. J. Ch. 177; 13 Jur. 333.)

8 & 9 Vict
c. 16
Sect 92.

The directors of a company incorporated by act of parliament for making a cemetery, being empowered thereby to make contracts and bargains touching the undertaking, and to do and transact all other matters which shall be required to be done and transacted for the direction and management of the company, are not thereby authorized to raise money for the purposes of the undertaking, by accepting or endorsing bills of exchange. (*Steele v. Hanner*, 14 Mees. & W. 831.)

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Proceedings of Directors.

And with respect to the proceedings and liabilities of the directors, be it enacted as follows:

XCII. The directors shall hold meetings at such times as they shall appoint for the purpose, and they may meet and adjourn as they think proper, from time to time and from place to place; and at any time any two of the directors may require the secretary to call a meeting of the directors: and in order to constitute a meeting of directors there shall be present at the least the prescribed quorum, and when no quorum shall be prescribed there shall be present at least one third of the directors; and all questions at any such meeting shall be determined by the majority of votes of the directors present, and in case of an equal division of votes the chairman shall have a casting vote in addition to his vote as one of the directors. (1)

Meeting of
directors.

(1) It was *held* that the president of the Annapolis and Elkridge Rail Road Co., in Maryland had a right to vote on questions to be decided by the President and Directors, and that his right to vote could not, by resolution, be restrained to the mere right of giving a casting vote, in case of a tie. (*McCullough v. A. & E Rail Road Co.*, 4 Gil, 58.)

The presi-
dent has a
right to vote
&c.

XCIII. At the first meeting of directors held after the passing of the special act, and at the first meeting of the di-

Permanent
chairman of
directors.

8 & 9 VICT
c 16

Sect. 94.

[*186]

rectors held after each annual appointment of directors, the directors present at such meeting shall choose one of the directors to act as chairman of the directors for the year following such choice, and shall also, if they think fit, choose another director to act as deputy chairman for the same period; and if the *chairman or deputy chairman die or resign, or cease to be a director, or otherwise become disqualified to act, the directors present at the meeting next after the occurrence of such vacancy shall choose some other of the directors to fill such vacancy; and every such chairman or deputy chairman elected as last aforesaid shall continue in office so long only as the person in whose place he may be so elected would have been entitled to continue if such death, resignation, removal, or disqualification had not happened.

Occasional
chairman of
directors.

XCIV. If at any meeting of the directors neither the chairman nor deputy chairman be present, the directors present shall choose some one of their number to be chairman of such meeting.

Committees
of directors.

XCV. It shall be lawful for the directors to appoint one or more committees, consisting of such number of directors as they think fit, within the prescribed limits, if any, and they may grant to such committees respectively power on behalf of the company to do any acts relating to the affairs of the company which the directors could lawfully do, and which they shall from time to time think proper to intrust to them.

Powers of
committees.

Meetings of
committees.

XCVI. The said committees may meet from time to time, and may adjourn from place to place, as they think proper, for carrying into effect the purposes of their appointment; and no such committee shall exercise the powers intrusted to them except at a meeting at which there shall be present the prescribed quorum, or if no quorum be prescribed then a quorum to be fixed for that purpose by the general body of directors; and at all meetings of the committees one of the members present shall be appointed chairman; and all questions at any meeting of the committee shall be determined by a majority of votes of the members present, and in case of an equal division of votes the chairman shall have a casting vote in addition to his vote as a member of the committee.

Contracts by
committee
or directors,

XCVII. The power which may be granted to any such committee to make contracts, as well as the power of the di-

rectors to make contracts on behalf of the company, may lawfully be exercised as follows : (that is to say,)

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c. 16.

Sect. 93.

how to be entered into.

With respect to any contract which, if made between private persons, would be by law required to be in writing, and under seal, such committee or the directors may make such contract on behalf of the company in writing, and under the common seal of the company, and in the same manner may vary or discharge the same :

*With respect to any contract which, if made between private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, then such committee or the directors may make such contract on behalf of the company in writing, signed by such committee or any two of them, or any two of the directors, and in the same manner may vary or discharge the same :

[*187]

With respect to any contract, which if made between private persons, would by law be valid although made by parol only, and not reduced into writing, such committee or the directors may make such contract on behalf of the company by parol only, without writing, and in the same manner may vary or discharge the same :

And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors or administrators, as the case may be ; and on any default in the execution of any such contract, either by the company or any other party thereto, such actions or suits may be brought, either by or against the company, as might be brought had the same contracts been made between private persons only. (u)

(u) A public company incorporated under act of parliament, cannot generally contract, except in the mode and upon the conditions specified either in the special act or the general act to which it is subject, such as this act. (*Homersham v. Wolverhampton Waterworks Co.*, 6 Exch. 137 ; 20 L. J. Exch. 193 ; 6 Railw. C 790.)

The plaintiff, an engineer, entered into a contract, under seal, with the Wolverhampton Waterworks Company, for the

8 & 9 Vict.
c. 16.

Sect. 57.

supply of machinery and the execution of works for the purposes of the company, with certain provisions as to extra work. The company was incorporated subject to the general provisions of this act; but by the special act, three directors were made a quorum. Much extra work was done by the plaintiff with the sanction of the engineer of the company, but not according to the provisions of the contract, and after the work was done and a claim made by him for the payment of the price stipulated in the contract, together with a further sum for the extra work, a sum of 1000*l.* was paid to him on the general account, but no proof was given that this payment was made by the order of three directors: it was held, in an action brought to recover for the extra work, that there was no evidence to go to the jury of any contract with the company. (*Ib.*)

[*188] It was questioned, whether upon proof that such payment *had been made by order of three directors, any contract binding on the company would have been implied. (*Ib.*) (1)

(1) The agent of an incorporated railway company agreed by parol with the plaintiff to purchase of him a quantity of railway sleepers, upon certain terms. The sleepers were received and used by the company:—

Liability of
power of di-
rectors to
contract by
parol.

Held, that there was evidence from which the jury might find a contract by the company; the 97th section of 8th & 9th Vict. c. 16, having provided that the directors may contract by parol, on behalf of the company, where private persons may make a valid parol contract.

Pauling v. the London and North Western Railway Co.
22 Eng. Law and Eq. 560.

Relief in
equity not
given in re-
spect of in-
formal con-
tract.

A company, incorporated by act of parliament, advertised for tenders for the formation of their line of railway. The plaintiff sent in a tender for a portion of the line, which was accepted by the engineer of the company authorized to act on their behalf, and such consent was recognized by the directors at a board meeting. Nothing further was done, and

no specific contract in a legal form was reduced into writing ^{8 & 9 Vict.} to which the seal of the company had been affixed. The ^{c 16.} plaintiff, in consequence, as he alleged, of the acceptance of ^{Sect. 97.} the tender, went to a great outlay in order to be prepared for proceeding with the works, but the whole scheme being afterwards abandoned, the directors refused to allow him compensation for the expenses incurred. The plaintiff filed his bill for relief, to which the company demurred generally for want of equity. Lord *Cottenham*, C., allowed the demurrer, and held, that where by legal enactment certain formalities are required to render contracts legally binding on the parties, the want of such formalities will not be a ground for giving jurisdiction in equity in matters to which such jurisdiction would not otherwise be extended. That in the argument of a demurrer, the mere allegation of trusteeship, which is a deduction of law, is not of itself sufficient, but the case made must support the allegation. (*Jackson v. North Wales Railw. Co.*, 6 Railw. C. 112; 1 Hall & T. 75. See *Kirk v. Bromley Union*. 2 Phill. C. C. 240; *Ambrose v. Dunmow Union*, 9 Beav. 508.) (1)

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(1) When stockholders in a corporation, after calls regularly made, are in default, a judgment creditor has a complete remedy at law against them; and, therefore, for this cause only, will not be allowed to proceed in equity. (*Allen v. Montgomery Rail Road Co.*, 11 Alabama 437)

A remedy at law for a judgment creditor when a stockholder makes a default in paying calls.

But a Court of Equity may interfere between two Rail Road companies, entitled to a joint use of a station, as in the following case :

Pending the progress of a bill through parliament, authorizing the S. V. Company to lease their line to the N. W. Company, the bill was opposed by the S. B. Company, and, upon a compromise, a clause was inserted, securing to the S. B. Company the use of part of the line and the joint use of a station, subject to the cesser of these rights in the event of the S. B. Railway Company being leased to or amalgamated with a fourth company, viz., the G. W., who were rivals to the N. W. Company. At this time the S. B. Company was under no engagements to the G. W. Company. Subsequently, however, those two companies entered into agreements,

8 & 9 VICT. giving facilities and preference to each other's traffic, and agreed
 c. 16. to amalgamate at a future time, if the sanction of parliament could
 Sect. 97. be obtained. *Held*, that this was not such a change of circumstances, produced by the conduct of the S. B. Company, as to exclude them from equitable relief by injunction for the enforcement of the rights of user conferred on them by the act.

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The court may interfere between two railway companies entitled to the joint use of a station by prescribing regulations for its management; but such interference ought not to take place without grave occasion. The court may also direct a partition of the station, and appoint a receiver if necessary. But where provisions exist for the settlement of disputes on the above subjects by arbitration, the court will withhold its interposition until the remedy thus provided has been resorted to. (*The Shrewsbury and Birmingham Railway Company v. Stour Valley Railway Company*, 21 Eng. Law and Eq. 628.)

Three directors of a railway company, subject to the provisions of a special act, and of this act, signed a document, intended to operate as an order on the company's bankers for payment to a third party of the company's money, in fraud of the company and for a purpose in violation of the special act. The document was signed by them in their own names, and countersigned by the secretary of the company, with the word "secretary" added to his signature. The three directors did not appear on the face of the document to sign as directors or to be directors. On the document was a stamp, containing the name of the company impressed in a circular form round the date, "13th August, 1847," which date was also at the head of the document. A similar stamp was impressed on all the documents of the company: it was held, that the document did not purport to be the cheque of the company, and was not binding on them. *Serrell v. Derbyshire, &c., Junction Railw. Co.*, 19 L. J. C. P. 371; 10 C. B. 910.)

Bills and
 notes.

A bill of exchange drawn on a completely registered joint stock company, by its corporate name, was accepted by two of the directors of the company, as follows: "Accepted J.

B. and E. N., directors of the C. Company, appointed by resolution to accept this bill." The bill was sealed with the corporate seal, having the corporate name of the company circumscribed, and was countersigned by the secretary: it was held, in an action upon the bill *against the company that the bill sufficiently expressed upon the face of it, that it was accepted on behalf of the company within the 45th section of the 7 & 8 Vict. c. 110, and that the company were liable upon the bill. (*Edwards v. Cameron's Coalbrook Steam Coal and Swansea and Lougher Railw. Co.*, 6 Exch. 269. *S. P. Halford v. Same*, 15 Jur. 335; 20 L. J. Q. B. 160.)

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By the deed of settlement of a joint stock company, completely registered under the 7 & 8 Vict. c. 110, it was, amongst other things, provided that it should not be lawful for the directors to contract any debts in conducting the affairs of the company, beyond the sum of 100*l* at any one time, except in the case of the purchase money for a certain newspaper, of which the board of directors might leave unpaid any part not exceeding 1000*l*., and might issue "a promissory note" or accept "a bill of exchange" on behalf of the company for such ballance: it was held, that the substance of the authority was, that the directors might contract a debt to the amount of 1000*l*., and secure it by a negotiable instrument; and that the directors having contracted a debt to that amount, were not precluded from giving security for it, *with its legal accretions*, by several notes or bills, instead of a single note or bill.) *Thompson v. Wesleyan Newspaper Association*, 8 C. B. 849; 19 L. J. C. P. 114.)

XCVIII. The directors shall cause notes, minutes, or copies, as the case may require, of all appointments made or contracts entered into by the directors, and of the orders and proceedings of all meetings of the company, and of the directors and committees of directors, to be duly entered in books, to be from time to time provided for the purpose, which shall be kept under the superintendence of the directors; and every such entry shall be signed by the

Proceedings
to be entered
in a book
and to be ev-
idence.

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Sect. 98. chairman of such meeting; and such entry, so signed, shall be received as evidence in all courts, and before all judges, justices and others, without proof of such respective meetings having been duly convened or held, or of the persons making or entering such orders or proceedings being shareholders or directors or members of committee respectively, or of the signature of the chairman, or of the fact of his having been chairman, all of which last-mentioned matters shall be presumed, until the contrary be proved (*v.*)

(*v.*) The direction in this section to enter contracts leads to the inference that in order to be binding the contracts mentioned in the preceding section, must be express contracts.

Signature of proceedings
[*190] A minute book made evidence by this section, may be made or transcribed from rough minutes made at the meeting. (*Re Jennings*, 1 Ir. Eq. R. N. S. 236.) It is a public duty of directors to enter resolutions in the books of the company. The act of incorporation of a railway company required that all resolutions come to at meetings of the proprietors should be entered in a book, and the entries were made evidence of the resolutions to which they referred. In a suit against the company for the specific performance of an agreement, the defendants were ordered to produce their books, with the usual liberty to seal up such parts as did not relate to the matters in question. The books were produced accordingly, but the pages left open furnished no evidence of the agreement. After the bill had been dismissed for want of evidence, the plaintiffs, on an affidavit of having recently discovered that the agreement had been recognized by a resolution passed at a meeting of the proprietors, applied for leave to file a supplemental bill in the nature of a bill of review, for the purpose of making the resolution part of their case; and the court, although, of opinion that the plaintiffs might with due diligence have made the discovery soon enough to have availed themselves of it in the original suit, nevertheless granted the motion, on the ground that if the defendants had entered the resolution in their books, as they ought to have done, the consequence of

any want of care and attention on the part of the plaintiffs or their agents would have been obviated. (*Sheffield Canal Co. v. Sheffield and Rotherham Railw. Co.*, 1 Phill. C. C. 484; 3 Railw. C. 486.)

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c. 16.
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Under the usual order for the production of books, &c., with liberty to seal up on affidavit such parts as did not relate to the matters in question, the defendants had produced a book with certain pages sealed up, and had made the required affidavit. The plaintiffs afterwards, on affidavit of facts leading strongly to the inference that one of the pages sealed up did relate to the question in dispute, moved that the defendants might produce the book unsealed; but the motion was refused, although the defendants declined to answer the affidavit. (S. C. 1 Phill. C. C. 484.)

A railway act required that the proceedings of all meetings should be entered in some book and signed by the chairman of such respective meetings. Signature at a subsequent meeting, at which the minutes of the former were read over and confirmed, by a person who was chairman at both meetings, was admitted to be sufficient. (*London and Brighton Railway Co. v. Fairclough*, 3 Scott, N. R. 68; 2 Man. & G. 674; 2 Railw. C. 544.) By stat. (6 & 7 Will. 4, c. lxxix.) incorporating a railway company, it was enacted "that the proceedings of all meetings of the company should be entered in a book, and *signed by the chairman of such respective meetings;*" and that the proceedings so entered and signed should be deemed originals, and allowed to be read in evidence, &c.: it was held, that the chairman who presided when the proceedings took place might sign such entry at the next meeting. Resolutions of a meeting on August 18th being entered in the book, were subscribed at the next meeting as follows: "Confirmed 24th August, 1836, W. G." *W. G. was chairman of both meetings. It was held a good signature of the proceedings of August 18th. (*West London Railw. Co. v. Bernard*, 3 Q. B. R. 873; 8 Jur. 144; Law J. 1844, Q. B. 68. See *Miles v. Bough*, 3 Gale & D. 119; 7 Jur. 81; 12 Law J. 1843, Q. B. 76; *Inglis v. Great*

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The Southampton Dock Act, 6 Will. 4, c. xxix. s. 63, directed that the orders and proceedings of every meeting of the company should be entered in a book kept for that purpose, and should be signed by the chairman at such meeting; and when so entered and signed, as also the minutes and entries therein after (sect. 75) provided to be kept, should be deemed original orders and proceedings, and should be allowed to be read in evidence in all courts, &c., without proof of such meeting having been duly convened, or of the persons making or entering such orders, &c., being proprietors or directors of the company. Section 75 provided that the directors should keep a regular minute and entry of the orders and proceedings at every meeting of directors, which should be signed by the chairman at each respective meeting: it was held, that the signature of the minutes, by the chairman, when presiding at a subsequent meeting, was sufficient. (*Southampton Dock Co. v. Richards*, *The same v. Arnott*, 2 Railw. C. 215; 1 Scott, N. R. 219; 1 Man. & G. 448.) The Sheffield and Manchester Railway Act, 7 Will. 4, c. xxi. s. 189, directed the orders and proceedings of the directors to be entered in a book and signed by the chairman of the meeting; and enacted, that when so entered and signed, they should be deemed originals, and be read in evidence without proof of the persons making or entering them being directors, or of the signature of the chairman: it was held, that a book of proceedings, purporting to be signed "W. S., deputy chairman," was evidence *per se*, without proof that W. S. was in fact deputy chairman, or as such presided at the meeting. (*Sheffield, Ashton-under-Lyne and Manchester Railw. Co. v. Woodcock*, 7 Mee. & W. 574; 2 Railw. C. 522.)

Where the act provided that the clerk of the company should, in a book provided by the company, keep an account of all acts, proceedings and transactions of the company, and that every proprietor should have liberty to inspect the same and take copies of the entries, it was held, that entries of the proceedings in the books so kept by the clerk were not

admissible in evidence on behalf of the company against one of their own members suing them. (*Hill v. Manchester and Salford Water Works Co.* 5 B. & Ad. 866. See *Bristol and Taunton Navigation Co. v. Amos*, 1 M. & Selw. 569.)

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c. 16.
Sect 99.

XCIX. All acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall, notwithstanding it may be afterwards discovered that there was some defect in the appointment of any such directors or *persons acting as aforesaid, or that they or any of them were or was disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

Informalities
in appoint-
ment of di-
rectors not
to invalidate
proceedings.
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C. No director, by being party to or executing in his capacity of director any contract or other instrument on behalf of the company, or otherwise lawfully executing any of the powers given to the directors, shall be subject to be sued or prosecuted, either individually or collectively, by any person whomsoever; and the bodies or goods or lands of the directors shall not be liable to execution of any legal process by reason of any contract or other instrument so entered into, signed or executed by them, or by reason of any other lawful act done by them in the execution of any of their powers as directors; and the directors, their heirs, executors and administrators shall be indemnified out of the capital of the company for all payments made or liability incurred in respect of any acts done by them, and for all losses, costs and damages which they may incur in the execution of the powers granted to them; and the directors for the time being of the company may apply the existing funds and capital of the company for the purpose of such indemnity, and may, if necessary for that purpose, make calls of the capital remaining unpaid, if any (*w*).

Directors not
to be person-
ally liable.

Indemnity of
directors.

(*w*) When persons act under a parliamentary trust and state themselves as so acting, they are not to be held personally liable. But this also I think rests on strong principle, that as the trustees must know whether there are funds to answer the purpose, they, when they contract with others who do not know, act as if representing that they had a fund

Personal lia-
bility of par-
liamentary
trustees.

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applicable to the object, and are then personally bound to provide funds to pay the contractors. (*Per* Lord Eldon, *Higgins v. Livingstone*, 4 Dow P. C. 341.) The commissioners acting under an act of parliament for making a navigation, with power to borrow money on the tolls, employed the plaintiff to do different parts of the works, and such of the commissioners as were present at the several meetings made orders relative thereto, every one of them were present at some of the meetings, but no one was present at all the meetings. The fund proving deficient, it was held that all the acting commissioners were personally liable to pay the plaintiff. (*Horsley v. Bell*, Ambl. 770; 1 Br. C. C. 101 n.)

If trustees of a turnpike road, canal, or any other public work act strictly within the line of their duty, they will not be personally liable unless upon a special contract. If they act beyond the scope of their public powers and order works to be done for which there is no fund, they may then be personally liable to the parties who advance money to defray
[*193] *the expenses of such works; that would always depend upon the circumstances of each particular case. (*Wilson v. Goodman*, 4 Hare, 62.)

The defendant, as chairman of trustees of a turnpike road, signed a resolution that the plaintiff should be requested to make a temporary advance of 2000*l.* to the trust. The plaintiff advanced the money, but received no security by mortgage of the tolls as prescribed by stat. 3 Geo. 4, c. 126, s. 81; it was held that the defendant was not exempted from personal responsibility by 7 & 8 Geo. 4, c. 64, s. 3, the meaning of these statutes being, that where a trustee shall have entered into a contract in the form prescribed by the statutes, he shall be taken to have acted in his representative capacity and shall not be personally charged; but if he enters into a contract not contemplated by the statute, his liability must accrue according to his own engagement and the intention of the parties. (*Parrott v. Eyre*, 10 Bing. 283; *Allen v. Waldegrave*, 8 Taunt. 566; *Wormwell v. Hailstone* 6 Bing. 668; *Sprott v. Powell*, 3 Bing. 478; *Eaton v. Bell*, 5 B. & Ald. 34.)

The resolution of an unincorporated company for the appointment of their secretary for a specified period at a weekly salary is not an agreement, or memorandum of an agreement requiring a stamp within 55 Geo. 3, c. 184. (See 13 & 14 Vict. c. 97, Sched. tit. Agreement; (*Vaughton v. Brine*, 1 Man. & G. 359.) Nor does a minute of a resolution entered [193] in the books of a joint stock company, for the acceptance of a tender for work to be done for the company, require such a stamp. (*Lucas v. Beach*, 1 Scott, N. R. 350; 1 Man. & G. 417.)

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c. 16.
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Wherever a person is concerned in a transaction in the confidential relation of agent for another, he shall not be allowed to take advantage of his situation in order to obtain a personal benefit to himself; and wherever he does obtain such a benefit he will be liable to account for it strictly to his employer. (*Carter v. Horne*, 1 Eq. Abr. 7; *Fawcett v. Whitehouse*, 1 Russ. & M. 132, See *Gillett v. Peppercorn*, 3 Beav. 78.) (1)

Directors
considered
as trustees.

(1) The shareholders of a railway company, at a general meeting, passed a resolution, by which they placed a large number of shares at the disposal of the directors, who as a body, did not interfere with the management of the company, but allowed G. H., their chairman, to exercise a supreme control over the company and its affairs. The shares were then placed in the share register in the name of G. H., at the end of the names of the shareholders, and he caused numbers of these shares to be transferred into the names of divers persons, and through different brokers sold them in the market at considerable premiums. Upon a bill filed by the company, *held*, that the office of directors is a place of trust, that unambiguous expressions alone could confer upon them any special power; that a resolution to place shares at the disposal of the directors, without more, did not render them irresponsible: that they were bound to give explanations to the shareholders, and could not derive any personal or pecuniary advantage from the mode of dealing with the shares: that a suggestion of the application of money for secret purposes will not exonerate the directors from accounting, nor can any person in a fiduciary position retain any remuneration for his services: that

Railway directors, responsibility of. Trust property. Secret service money. Shareholders' acquiescence.

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an acquiescence in the acts of the directors cannot be raised by a production of the share register books at the meetings of the company, and consequently that G. H. must account for the shares disposed of and pay the costs up to the hearing of resisting the account. (*The York and North Midland Railway Company v. Hudson*, 19 Eng. Law and Eq. 361.)

Committee men or directors are properly the agents of those who employ them, and who empower them to direct and superintend the affairs of the corporation. (*Charitable Corporation v. Sutton*, 2 Atk. 404.) The employment of a director is of a mixed nature, partaking of the nature of a public office when it arises under an act of parliament or by charter of the crown. If some directors are guilty of a gross non-attendance and leave the management entirely to others, they may be guilty by these means of the breaches of trust which are committed by others. By accepting a trust of this sort, persons are obliged to execute it with fidelity and reasonable diligence, and it is no excuse that they had no benefit from it, and that it was merely honorary, therefore they are within the case of common trustees, who are bound to perform a trust which they have undertaken. Supine and gross negligence of duty will amount to a breach *of trust. (*Charitable Corporation v. Sutton*, 2 Atk. 400; see *Coggs v. Bernard*, 1 Salk. 26.)

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Directors to whom exclusively the entire management of a company is entrusted, and who receive a remuneration for their trouble out of the funds of the company, are under an obligation to the shareholders at large to use their best exertions in all matters which relate to the affairs of the company, for the welfare of the concern thus entrusted, not gratuitously, to their charge. Without any special provision for the purpose, it is by law an implied and inherent term in the engagement that they shall not make any other profit to themselves of that trust or employment, and shall not acquire to themselves, while they remain directors an interest adverse to their duty (*Benson v. Heathorn*, 1 Y. & Coll. C.C. 326; *York and North Midland Railway Co. v. Hudson*, 11th Feb. 1853, M. R.)

Some shareholders in a joint stock company may sue on behalf of themselves and the other shareholders, for the purpose of compelling directors of the company to refund monies improperly withdrawn by them from the stock of the company and applied to their own use. In a suit instituted by certain shareholders in the Arigna Mining Company, on behalf of themselves and all other shareholders, except the defendants, against the chairman and acting directors of the company, and against certain other persons professionally connected with it, it appeared from the statement in the bill that the company originated with *Sir William Congreve* and two persons of the name of *Clarke*, by whose exertions chiefly it was organized; that it was established for the purpose of working certain mineral property in Ireland, represented to be of great value, and of which it was proposed that the company should purchase a lease; and that *Congreve* and the *Clarks* having been appointed to confidential and responsible situations in the management, took upon themselves to act for the common interests. The bill alleged that in that capacity they were exclusively concerned on behalf of the company in negotiating the terms of the proposed purchase; that by a series of underhand contrivances, particularly set forth, they had succeeded in charging 25,000*l.* to the company as the consideration paid for the lease, although they had in fact obtained it from one *Flattery*, the owner, for the sum of 10,000*l.* only; and that the 15,000*l.*, making up the difference, had been received by the *Clarks*, and been by them distributed in various proportions as a bonus among the several defendants. It charged that this distribution was made under such circumstances that all the defendants must, or at least on due inquiry might, have known the source from which the funds were derived; that as the appropriation had never been sanctioned by the rest of the shareholders, but, on the contrary, had been studiously concealed from them, it was a gross fraud upon the partnership; and that the defendants ought therefore in equity to be regarded as trustees to the extent of the sums they had received. And it prayed they

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Directors
will be com-
pelled to re-
fund money
improperly
withdrawn
from the
concern.

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might be decreed to refund *what they had so respectively received, and pay it into the bankers of the company for the use of the proprietors at large. To this bill a demurrer for want of equity was filed by two of the defendants, not directors, who had received sums, part of the 15,000*l.*, as a bonus for their services in the formation of the company, in pursuance, as was alleged, of a previous stipulation and with a knowledge of the manner in which the money was obtained. The Vice-Chancellor over-ruled the demurrer, and his order was on appeal affirmed by the Lord Chancellor on the 3d May, 1828. (*Hichens v. Congreve*, 4 Sim. 420 ; 4 Russ. 562 ; 1 Russ. M. 150, n.)

When the
projectors
become trus-
tees for the
company.

A person projecting the formation of a company and inviting the public to join him in the project, on a representation that he had acquired property which was intended for the purposes of the company, will amount to an invitation to the public to participate in the benefit of the property purchased. The fiduciary character of the projector would, in such a case, commence from the time when he first began to deal with the public, and would be controlled in equity by the representation he then made to the public. If, on the other hand, persons intending to form a company should purchase land with a view to the formation of it, and state at once that they were the owners of such land and proposed to sell it at a fixed price for the purposes of the company about to be formed, the transaction, so far as the public are concerned, commencing with that statement, may not fall within the above principle. (*Foss v. Harbottle*, 2 Hare, 489.)

A bill may be brought by the present directors of a joint stock company, on behalf of themselves and all other members of the company, against the former directors of the company, for the purpose of being relieved against a fraud in which all the former directors are alleged to have been implicated. (*Benson v. Heathorn*, 1 Y. & Coll. N. C. 326 ; *Taylor v. Salmon*, 1 My. & C. 142.)

A corporation may institute a suit for setting aside transactions fraudulent against it, although carried into effect in its

name by members of the governing body. The members of ^{8 & 9 VICT.} of the governing body are agents of a corporation, and if they ^{c. 16} exercise their functions for the purpose of injuring its inter- ^{Sect 100} ests and alienating its property, they are personally liable for any loss occasioned thereby. (*Attorney-General v. Wilson*, 1 Cr. & P. 1; *Attorney-General v. Aspinall*, 2 My. & Cr. 621; *Attorney-General v. Brown*, 1 Swanst. 265; *Corporation of Colchester v. Lowten*, 1 Ves. & B. 226.)

If a transaction be void on account of exceeding the powers of the corporation and not merely voidable, the corporation cannot confirm it, so as to bind a dissenting minority of its members. (*Preston v. Grand Collier Dock Co.*, 11 Sim. 327; 2 Railw. C. 335; *Foss v. Harbottle*, 2 Hare, 493, 504.)

In a bill by two of the proprietors of shares in a company incorporated by act of parliament, on behalf of themselves *and all others the proprietors of shares, except the defendants, against the five directors (three of whom had become bankrupt) and against a proprietor who was not a director, and the solicitor and architect of the company, charging the defendants with concerting and effecting various fraudulent and illegal transactions, whereby the property of the company was misapplied, aliened and wasted; that there had ceased to be a sufficient number of qualified directors to constitute a board; that the company had no clerk or office; that in such circumstances the proprietors had no power to take the property out of the hands of the defendants, or satisfy the liabilities, or wind up the affairs of the company; praying that the defendants might be decreed to make good to the company the losses and expenses occasioned by the acts complained of, and praying the appointment of a receiver to take and apply the property of the company in discharge of its liabilities and secure its surplus. The defendants demurred. It was held, that upon the facts stated, the continued existence of a board of directors *de facto* must be intended; that the possibility of convening a general meeting of the proprietors, capable of controlling the acts of the existing board, was not excluded by the allegations of the bill; that, in such circumstances, there was nothing to prevent the company from obtaining

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redress in its corporate character in respect of the matters complained of; that, therefore, the plaintiffs could not sue in a form of pleading which assumed the practical dissolution of the corporation; and that the demurrer must be allowed. (*Foss v. Harbottle*, 2 Hare 461.)

The rule, that a suit by individual shareholders in an incorporated company, complaining of an injury to a corporation, cannot be maintained, if it appears that the plaintiffs have the means of procuring a suit to be instituted in the name of the corporation itself, applies equally whether the subject matter of complaint be an act or transaction which is merely voidable at the discretion of a majority of shareholders or an act or transaction absolutely illegal, and incapable of being confirmed by such majority. (*Mozley v. Alston*, 1 Phill. C. C. 790.)

The court will not entertain a bill by shareholders in an incorporated company seeking merely to restrain the directors *de facto* from acting as such, on the sole ground of the alleged invalidity of their title to their offices.

A general demurrer to a bill by two members of an incorporated railway company in their individual characters, against the corporation and twelve other members who were alleged to have usurped the office of directors, and to be exercising the functions thereof, as a majority of the governing body, injuriously to the interests of the company, praying that these twelve directors might be restricted from acting as directors, and be ordered to deliver the common seal and the property, and the books of the company in their possession, to six other persons who were alleged to be the only duly constituted directors, was on both the above grounds allowed. (*Mozley v. Alston*, 1 Phill. C. C. 790.)

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*An incorporated railway company issued new shares, in pursuance of a resolution declaring the purpose of such new issue to be the raising of a sufficient amount to pay off the existing mortgage and bond debts of the company. The holder of some of the new shares filed a bill, on behalf of himself and other holders of the shares, against the directors and

the company, alleging facts to show, and charging that they were about to apply the money paid in respect of the shares otherwise than in conformity with the resolution, and praying for a declaration that the money ought to be applied according to the terms of the resolution, and for a specific performance of the agreement thereby entered into, and for an injunction: it was held, allowing the demurrers of the directors and the company, that the case fell within the authority of the case last cited, but the costs of only one demurrer were allowed. (*Yetts v. Norfolk Railw. Co.*, 3 De G. & S. 223; 13 Jur. 249; 6 Railw. C. 487.)

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A demurrer to a bill by one of the shareholders of an incorporated mining company on behalf of himself and all other shareholders, except the members of the governing body, who were defendants, impeaching several transactions of that body, which it appeared had been sanctioned by majorities at general meetings of the shareholders, and amongst which was a project to vest all the property of the company in trustees, for the purpose of liquidating its affairs, was allowed, notwithstanding some vague and general charges of fraud and misconduct on the part of the defendants, and an allegation that, by the constitution of the company, no one but the governing body could convene a general meeting; the specific acts complained of not being clearly such as in the opinion of the court it was incompetent to a majority of shareholders to sanction. This case was decided upon the ground that all the complaints made by the individual shareholder consisted of acts within the powers of the corporation, and no allegation raised any case for the interference of a court of equity with the exercise of such rights. And it was said by Lord *Cottenham C.*, that a court of equity could not assume jurisdiction in such a case, without opening its doors to all parties interested in corporations or joint stock companies, or private partnerships, who, although a small minority of the body to which they belong, may wish to interfere with the conduct of the majority. (*Lord v. Governor and Co. of Copper Miners*, 2 Phill. C. C. 740. See 6 Railw. C. 143, where *K. Bruce*, V. C., questions the judicial soundness of this class of cases.

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The Court of Chancery will not entertain a bill which appears to be an attempt to induce the court to interfere in the internal affairs of the company, and to take on itself to determine the question whether with a view to the management of the affairs of the company it is proper to raise money from shareholders whom the plaintiff assumes to represent, without having ever paid up the call or attended the meeting of the company in which the question, whether any such call was to be made, was discussed or determined. **(Bailey v. Birkenhead, &c., Junction Railw. Co., 6 Railw. C. 256.)*

In an amalgamated railway company there were three classes of shareholders. A shareholder of one class filed a bill on behalf of himself and all others of the class, stating that an unfair and unnecessary call had been corruptly made on that class, which some had paid, but that the plaintiff had refused to pay it; and praying that an account might be taken to ascertain the propriety and necessity of the call, and for an injunction: it was held that this was an attempt to induce this court to interfere in the internal management of the affairs of a continuing company, and a general demurrer to the bill was allowed: it was held, also, that the shareholders of the same class as the plaintiff who had paid the call, and the other two classes of shareholders, ought to be represented. (*Bailey v. Birkenhead &c. Junction Railw. Co., 12 Beav. 433; 14 Jur. 119; 19 L. J. Chanc. 377; 6 Railw. C. 256. See post, p 205.*)

Appointment and Duties of Auditors.

And with respect to the appointment and duties of auditors, be it enacted as follows:

Election of
auditors.

CI. Except where by the special act auditors shall be directed to be appointed otherwise than by the company, the company shall at the first ordinary meeting after the passing of the special act, elect the prescribed number of auditors, and if no number is prescribed two auditors, in like manner as is provided for the election of directors; and at the first ordinary meeting of the company in each year thereafter the company shall in like manner elect an auditor to supply the

place of the auditor then retiring from office, according to the provision hereinafter contained; and every auditor elected as hereinbefore provided, being neither removed nor disqualified nor having resigned, shall continue to be an auditor until another be elected in his stead.

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c. 16.
Sec. 102.

CII. Where no other qualification shall be prescribed by the special act, every auditor shall have at least one share in the undertaking; and he shall not hold an office in the company, nor be in any other manner interested in its concerns, except as a shareholder.

Qualification
of auditors.

CIII. One of such auditors (to be determined in the first instance by ballot between themselves, unless they shall otherwise agree, and afterwards by seniority) shall go out of office at the first ordinary meeting in each year; but the auditor so going out shall be immediately re-eligible, and after any such re-election *shall, with respect to the going out of office by rotation, be deemed a new auditor.

Rotation of
auditors.

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CIV. If any vacancy take place among the auditors in the course of the current year, then at any general meeting of the company the vacancy may, if the company think fit, be supplied by election of the shareholders.

Vacancies in
office of au-
ditor.

CV. The provision of this act respecting the failure of an ordinary meeting at which directors ought to be chosen shall apply, *mutatis mutandis*, to any ordinary meeting at which an auditor ought to be appointed (*y.*)

Failure of
meeting to
elect auditor.

(*y*) *Ante*, s. 84, p. 180.)

CVI. The directors shall deliver to such auditors the half-yearly or other periodical accounts and balance sheet fourteen days at the least before the ensuing ordinary meeting at which the same are required to be produced to the shareholders as hereinafter provided.

Delivery of
balance sheet
&c by di-
rectors to au-
ditors.

CVII. It shall be the duty of such auditors to receive from the directors the half-yearly or other periodical accounts and balance sheet required to be presented to the shareholders, and to examine the same.

Duty of ad-
ditors.

CVIII. It shall be lawful for the auditors to employ such accountants and other persons as they may think proper, at the expense of the company, and they shall either make a special report on the said accounts, or simply confirm the

Powers of
auditors.

8 & 9 VICT. same; and such report or confirmation shall be read, together with the report of the directors, at the ordinary meeting.

c. 16.

Sect. 109.

Accountability of Officers.

And with respect to the accountability of the officers of the company, be it enacted as follows:

Security to
be taken from
officers in-
trusted with
money.

CIX. Before any person entrusted with the custody or control of monies, whether treasurer, collector, or other officer of the company, shall enter upon his office, the directors shall take sufficient security from him for the faithful execution of his office. (z)

(z) If the company take security from an officer, and afterwards the company is amalgamated, the union of two companies does not alter the situation of the principal or surety and the officer will be bound to account to the new joint corporation for all that he was before bound to account. In an action of debt, on bond, conditioned for the payment by the chief clerk of a railway company, it appeared that he had allowed the other clerks to be in arrear, and made up the deficiency on one day by appropriating to it a portion of the monies received on the following day, but had, in fact, paid over a sum equal to the amount received on each day up to the time of his dismissal: it was held a breach of the condition, and that the plaintiffs were entitled to recover as damages the full amount of the deficiency. (*London, Brighton, and South Coast Railw. Co. v. Goodwin*, 6 Railw. C. 177; 3 Exch. 320. See the form of the condition of the bond in this case. (1)

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(1) Two railway companies were amalgamated by an act of parliament, which contained, *inter alia*, a clause that "from and immediately after, &c., all the monies, goods, chattels, steam and other engines, carriages, waggons, trucks, machines, live and dead stock, shares, bonds, deeds, securities, books, writings, maps, plans, and other personal estate and effects of or to which the dissolved companies, or either of them, were possessed or entitled at law or in equity immediately before the granting thereof, shall be vested in and belong to the new company for their absolute benefit; and all persons and corporations who, immediately before the granting of

such certificate, owed any sum of money to the dissolved companies, or either of them, or to any person on behalf of the dissolved companies, or either of them, shall, after the granting thereof, pay the same, together with all interest, if any, due, or to accrue due for the same, to the new company, and all the rights and remedies for enforcing payment thereof which before the granting of such certificate belonged to the dissolved companies, or either of them, shall immediately after the granting thereof, devolve upon and be vested in the new company, and all monies which, immediately before the granting of such certificate were due and owing by or recoverable from the dissolved companies, or either of them, or for the payment of which they or either of them, were or but for the granting of such certificate would have been liable, shall be paid, with all interest, if any, due and to accrue due thereon, by or be recoverable from the new company; and all conveyances, contracts, agreements, mortgagees, bonds, covenants, and securities made or entered into before the granting of such certificate, to, with, in favor of, or by or for the dissolved companies, or either of them, or any person duly authorized on their behalf, shall, immediately after the granting of such certificate, be and remain as good, valid, and effectual, in favor of, and against, and with reference to the new company, and may be proceeded on and enforced in the same manner to all intents and purposes, as if the last mentioned company had been a party to and executed the same, or had been named or referred to therein, instead of the persons, company, or party actually named therein respectively." Before the amalgamation, A had become security by bond to one of the companies for the conduct of B, whom they had taken into their employ. B having continued in the service of the amalgamated company:

Held, that A was liable to them for breaches of the bond committed after the amalgamation. *The Eastern Union Railway Co. v. Cochrane*, 24 Eng. Law and Eq., 495.

CX. Every officer employed by the company shall from time to time, when required by the directors, make out and deliver to them, or to any person appointed by them for that purpose, a true and perfect account in writing under his hand of all monies received by him on behalf of the company; and such account shall state how, and to whom, and for what

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Sect. 110.

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Officers to
account on
demand.

8 & 9 Vict.
c. 17

Sect. 110.

Summary re-
medy against
parties fail-
ing to ac-
count.

purpose such monies shall have been disposed of ; and together with such account, such officer shall deliver the vouchers and receipts for such payments ; and every officer shall pay to the directors, or to any person appointed by them to receive the same, all monies which shall appear to be owing from him upon the balance of such accounts.

CXI. If any such officer fail to render such account, or to produce and deliver up all the vouchers and receipts relating to the same in his possession or power, or to pay the balance thereof when thereunto required, or if for three days after being thereunto required he fail to deliver up to the directors, or to any person appointed by them to receive the same, all papers and writings, property, effects, matters, and things, in his possession or power, relating to the execution of this or the special act, or any act incorporated therewith, or belonging to the company, then, on complaint thereof being made to a justice, such justice shall summon such officer to appear before two or more justices at a time and place to be set forth in such summons, to answer such charge ; and upon the appearance of such officer, or in his absence upon proof that such summons was personally served upon him, or left at his last known place of abode, such justices may hear and determine the matter in a summary way, and may adjust and declare the balance owing by such officer ; and if it appear, either upon confession of such officer, or upon evidence, or upon inspection of the account, that any monies of the *company are in the hands of such officer, or owing by him to the company, such justices may order such officer to pay the same ; and if he fail to pay the amount it shall be lawful for such justices to grant a warrant to levy the same by distress, or, in default thereof, to commit the offender to jail, there to remain without bail for a period not exceeding three months, unless the same be sooner paid.

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Officers re-
fusing to de-
liver up doc-
uments &c.,
to be impris-
oned.

CXII. If any such officer refuse to make out such account in writing, or to produce and deliver to the justices the several vouchers and receipts relating thereto, or to deliver up any books, papers, or writings, property, effects, matters, or things, in his possession or power, belonging to the company, such justices may lawfully commit such offender to jail, there to remain until he shall have delivered up all the vouchers and receipts, if any, in his possession or power, relating to such accounts, and have delivered up all books,

papers, writings, property, effects, matters and things if any, in his possession or power, belonging to the company.

9 & 9 Vict.
c. 16
Sect. 113.

CXIII. Provided always, that if any director or other person acting on behalf of the company shall make oath that he has good reason to believe, upon grounds to be stated in his deposition, and does believe, that it is the intention of any such officer as aforesaid to abscond, it shall be lawful for the justice before whom the complaint is made, instead of issuing his summons, to issue his warrant for the bringing such officer before such two justices as aforesaid; but no person executing such warrant shall keep such officer in custody longer than twenty-four hours, without bringing him before some justice; and it shall be lawful for the justice before whom such officer may be brought either to discharge such officer, if he think there is no sufficient ground for his detention, or to order such officer to be detained in custody, so as to be brought before two justices, at a time and place to be named in such order, unless such officer give bail to the satisfaction of such justice for his appearance before such justices to answer the complaint of the company.

Where officer about to abscond, a warrant may be issued in the first instance.

CXIV. No such proceeding against or dealing with any such officer as aforesaid shall deprive the company of any remedy which they might otherwise have against such officer, or any surety of such officer.

Surities not to be discharged.

**Keeping and Inspecting of Accounts.*

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And with respect to the keeping of accounts, and the right of inspection thereof by the shareholders, be it enacted as follows :

CXV. The directors shall cause full and true accounts to be kept of all sums of money received or expended on account of the company by the directors and all persons employed by or under them, and of the matters and things for which such sums of money shall have been received or disbursed and paid.

Accounts to be kept.

CXVI. The books of the company shall be balanced at the prescribed periods, and if no periods be prescribed, fourteen days at least before each ordinary meeting; and forthwith on the books being so balanced an exact balance sheet

Books to be balanced.

8 & 9 Vict.
c. 16
Sect. 117.

shall be made up, which shall exhibit a true statement of the capital stock, credits, and property of every description belonging to the company, and the debts due by the company at the date of making such balance sheet, and a distinct view of the profit or loss which shall have arisen on the transactions of the company in the course of the preceeding half year; and previously to each ordinary meeting such balance sheet shall be examined by the directors, or any three of their number, and shall be signed by the chairman or deputy chairman of the directors.

Inspection of
accounts by
shareholders
at stated
times.

CXVII. The books so balanced, together with such balance sheet as aforesaid, shall for the prescribed periods, and if no periods be prescribed for fourteen days previous to each ordinary meeting, and for one month thereafter, be open for the inspection of the shareholders at the principal office or place of business of the company; but the shareholders shall not be entitled at any time, except during the periods aforesaid, to demand the inspection of such books, unless in virtue of a written order signed by three of the directors. (a)

(a) The taking out a summons is a sufficient demand of inspection from the directors. (*Birmingham and Thames Junction Railw. Co. v. White*, 2 Q. B. 282; 2 Railw. C. 863. See *ante*, p. 97.)

Balance
sheet to be
produced at
the meeting.

CXVIII. The directors shall produce to the shareholders assembled at such ordinary meeting the said balance sheet, applicable to the period immediately *preceeding such meeting, together with the report of the auditor thereon, as herein before provided. (b)

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(b) *Ante*, sect. 107, p. 199.

Book-keeper
to allow in-
spection of
the accounts
at the ap-
pointed time.

CXIX. The directors shall appoint a book-keeper to enter the accounts aforesaid in books to be provided for the purpose; and every such book-keeper shall permit any shareholder to inspect such books, and to take copies or extracts therefrom, at any reasonable time during the prescribed periods, and if no periods be prescribed during one fortnight before and one month after every ordinary meeting; and if he fail to permit any such shareholder to inspect such books or take copies or extracts therefrom, during the periods afore-

said, he shall forfeit to such shareholder for every such offence a sum not exceeding five pounds.

8 & 9 VICT.
c. 16.
Sect. 120.

Dividends.

And with respect to the making of dividends, be it enacted as follows :

CXX. Previously to every ordinary meeting at which a dividend is intended to be declared, the directors shall cause a scheme to be prepared, showing the profits, if any, of the company for the period current since the preceeding ordinary meeting at which a dividend was declared, and apportioning the same, or so much thereof, as they may consider applicable to the purposes of dividend, among the shareholders, according to the shares held by them respectively, the amount paid thereon, and the periods during which the same may have been paid, and shall exhibit such scheme at such ordinary meeting, and at such meeting a dividend may be declared according to such scheme (c.)

(c) When the expenses are paid and the public purposes directed and provided for by the act of parliament are fully performed, any surplus which may remain after setting apart the sum to answer contingencies, may, if not applied in enlarging, improving or repairing the works, be divided among the shareholders. (See s. 122, *post* p. 205.) The dividends which belong to the shareholders may be applied by them severally as their own property ; but the company itself, or the directors, or any number of the shareholders assembled at a meeting or otherwise, have no right to dispose of the shares of the general dividend which belong to the particular shareholder in any manner contrary to the will, or without the consent or authority, of that particular shareholder. Any application of our dealing with the capital, or any funds and money of the company which may come under the control or management of the directors or governing body of the company in any manner not distinctly authorized by the act of parliament under which the directors derive their authority, is an illegal application or dealing. (*Salomons v. Laing*, 6 Railw. C. 301. Per Lord *Langdale*, M. R.)

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8 & 9 Vict.
c. 16.
Sect. 120.

It seems that each shareholder has a right of action in case of non-payment of a declared dividend, by analogy to the following cases : *Davis v. Bank of England*, 2 Bing. 303 ; 5 B. & C. 185 ; *Coles v. Bank of England*, 10 Ad. & E. 437 ; *Fristal v. King's Coll., Cambridge*, 10 Beav.

[204] 491. In reference to the two first cases Lord *Cottenham*, C., said, " they show at least that, at law, the title of a party to whom a dividend is payable is recognized as a separate and independent right." (6 Railw. C. 625.) (1)

Married wo-
men, chose
in action—
Railroad
stock.

(1) A husband and wife may sue jointly against a Rail Road Company for dividends on stock of the company purchased by the wife out of her own earnings, and of which stock she is the registered owner in the books of the company, and if the wife sues alone, the non-joindre of her husband is only matter of abatement. (*Dalton v. the Midland Railw. Co.*, 20 Eng. Law and Eq. 273.)

Injunction
in respect of
dividend.

The forty-second section of the 8 & 9 Vict. c. cc., provides " that if so much of the railway by that act authorized to be made, as may be transferred to the South Eastern Railway Company, shall not be completed within three years from the completion of such transfer, it shall not be lawful after the expiration of the said period for the South Eastern Railway Company, unless authorized by parliament so to do, to pay any dividend until the whole of the said railway shall be opened to the public for traffic." The transfer was completed ; and, although more than three years had expired since such completion, the railway was not opened for traffic. The South Eastern Comp'y nevertheless, at three intervals of half a year each, declared three dividends, two of which were duly paid. A holder of a particular class of shares, who had received interest thereon, filed his bill on the same day on which the third dividend was declared, on behalf of himself and all other the shareholders of the company, except the directors, praying an injunction to restrain the company from paying any dividend, whether declared or thereafter to be declared, until the railway in question had been opened to the public for traffic. Lord *Langdale*, M. R., granted an injunction as

to future dividends, but held that the court might exercise its discretion as to the dividend then declared, and gave liberty to the defendants to make out a case by affidavit, to induce the court not to interfere. The defendants having failed to satisfy the court, the injunction was granted as to the dividend then declared, but not yet paid. Lord *Cottenham*, C., on appeal, discharged so much of that order as restrained the payment of the dividend declared before the injunction issued and affirmed the rest of the order. It was held, that the right of each shareholder to a declared dividend is a separate interest, and cannot be represented by a plaintiff suing on behalf of himself and all other shareholders. As to the *dividend declared*, there was not only no community of interest but a direct adverse interest as between the plaintiff and those other shareholders, and no bill on behalf of the two *could be maintained. (*Carlisle v. South Eastern Railw. Co.*, 6 Railw. C. 670; 2 Hall & T. 366; 1 Mac. & G. 689.)

8 & 9 VICT.
c. 16.
Sect. 120.

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It has not been yet settled to what extent, or subject to what particular limitations the jurisdiction of the Court of Chancery ought to be exercised, in preventing or checking the erroneous conduct of corporations created by act of parliament for public purposes; but the classes of cases in which this court has been called on to interfere arise from a combination, first, of acts illegal as to the public; secondly, breaches of contract with the subscribers; and, thirdly, acts incapable of being rectified by the shareholders themselves, in the exercise of their own powers. (*Browne v. Monmouthshire Railway and Canal Company*, 13 Beav. 32; 15 Jur. 475; 20 L. J. Chanc. 497. See *ante*, p. 198.)

Interference
with internal
management.

It is necessary in such cases to distinguish between the duty of the governing body to the public and their duty to their shareholders. (*Ib.*)

After the expiration of the time for completing a railway, which by their act the company were "required" to make, a bill was filed by a shareholder, seeking to restrain the company from making any dividend until the whole of the works had been completed. A general demurrer was allow-

8 & 9 Vict.
c 16.
Sect. 121. ed, on the ground that the non-completion being a public wrong, the court had not jurisdiction to interfere, and that the misapplication of the income was the subject of internal regulation. (*Ib.*)

This court does not attempt to direct the performance of all the duties which the governing bodies of such companies owe to the shareholders; but on the contrary, leaves to the companies themselves the enforcement of all the duties arising out of matters which are the subject of internal management. (*Ib.*)

It cannot be safely said that, in no case whatever, joint-stock companies ought to be allowed to divide any profits or receive any tolls until all their works have been completed. (*Ib.*)

The court disapproved of the practice of filing demurrers, in railway cases, on mere formal and technical grounds. (*Ib.*)

Dividend not to be made so as to reduce capital.

CXXI. The company shall not make any dividend where- by their capital stock will be in any degree reduced: provided always, that the word "dividend" shall not be construed to apply to a return of any portion of the capital stock, with the consent of all the mortgagees and bond creditors of the company, due notice being given for that purpose at an extraordinary meeting to be convened for that object.

Power to directors to set apart a fund for contingencies.

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CXXII. Before apportioning the profits to be divided among the shareholders the directors may, if they think fit, set aside thereout such sum as they may think proper to meet contingencies, or for enlarging, repairing, or improving the works connected *with the undertaking, or any part thereof, and may divide the balance only among the shareholders. (c.)

(c.) See *ante*, p. 204, n.

Dividend not to be paid unless all calls paid.

CXXIII. No dividend shall be paid in respect of any share until all calls then due in respect of that and every other share held by the person to whom such dividend may be payable shall have been paid. (1.)

Dividends when made.

(1) Dividends declared by a corporation must be general upon

all the stock. (*Ryder v. Alton and Sangamon Railroad Co.*, 8 & 9 Vict. c. 16, 13 Illinois, 516.)

Sect. 124.

There must be a special demand for dividends before action brought; and until demand, no limitations run, and no interest will accrue.

No suit, can be maintained against a corporation for a dividend declared, until a demand has been made. (*State v. Baltimore and Ohio Railroad Co.*, 6 Gill., 363.) [206]

Held further, that interest will not be charged against a corporation on dividends declared; nor will limitations run until demand made. (*Ib.*)

Making of By-Laws.

And with respect to the making of by-laws, be it enacted as follows (*d*):

(*d*) See further provisions as to by-laws, *ante*, pp. 7, 15, 16; s. 145, *post* p. 213; 8 & 9 Vict. c. 20, ss 109—111, *post*.

CXXIV. It shall be lawful for the company from time to time to make such by-laws as they think fit, for the purpose of regulating the conduct of the officers and servants of the company, and for providing for the due management of the affairs of the company in all respects whatsoever, and from time to time to alter or repeal any such by-laws, and make others, provided such by-laws be not repugnant to the laws of that part of the united kingdom where the same are to have effect, or to the provisions of this or the special act; and such by-laws shall be reduced into writing, and shall have affixed thereto the common seal of the company; and a copy of such by laws shall be given to every officer and servant of the company affected thereby. (*e*).

Power to make by-laws for the officers of the company.

(*e*) The 5 Will. 4, c. x, incorporated the London and Croydon Railway Company, and by section 106 empowered the company to make by-laws for the good government of the affairs of the company, and for regulating the proceedings, and remunerating and reimbursing the expenses of the directors, and for the management of the undertaking and of the officers and servants of the company in all respects

Illegal arrest of a railway passenger under a by-law.

8 & 9 Vict.

c 16.

Sect. 124.

whatever, and to impose and inflict reasonable fines and forfeitures upon persons offending against the same, not exceeding 5*l.* for any one offence, to be levied and recovered as any penalty might by that act be levied and recovered, such by-laws to be binding upon and to be observed by all parties, provided that they were not repugnant to the laws of England or the directions of that act. The 148th sect. enacted, that it should be lawful for the company to make orders and regulations for regulating the traveling upon and use of the railway, and for or relating to travelers upon *the line, such orders and regulations to be binding upon travelers and passengers passing upon the railway upon pain of forfeiting and paying a sum not exceeding 5*l.* By section 163, penalties and forfeitures imposed by the act, of which there were several, or by any by-law, might be recovered in a summary way by the adjudication of justices, half the penalty to go to the informer and the other half to the company. And sect. 165 enacted, that it should be lawful for any officer or agent of the company to seize any person, whose name and residence should be unknown to such officer or agent, who should commit any offence against that act, and to convey him, &c. before a justice, without any warrant or other authority than that act. The company made a by-law, whereby a passenger not producing or delivering up his ticket was to be required to pay the fare from the place where the train originally started: it was held, that this was not a by-law imposing a penalty or forfeiture, and that the arrest of a passenger not producing his ticket and refusing to pay the fare from the place where the train originally started was illegal.

(*Chilton v. London and Croydon Railw. Co.*, 16 Mees. & W. 212; 11 Jur. 149; Law J. 1847, Exch. 89; 5 Railw. C.

4.) *Parke*, B. observed, "this is not the case of a penalty; but the mere demand of a fare. Any passenger who, at the end of his journey, does not produce his ticket, may have broken his contract with the company, and be liable to pay the full fare from the most remote terminus. But this is not a penalty or forfeiture under section 163. Then what

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offence against the act is it on which sect. 165 can attach? 8 & 9 VICT.
 The breach of any by-law is not within that section. The c. 16
 by-law may be defective in not making a party under such Sect. 121.
 circumstances liable to a penalty. But if so, the remedy
 is to alter the by-law under proper authority." It was
 questioned, whether the 165th sect. gives power to apprehend
 a person except for an offence against the act of parliament
 itself; and also whether the by-law was a reasonable and
 valid by-law. (*Ib.* See *Rex v. Birkenhead, &c. Junction*
Railw. Co., 6 Railw. C. 795; *Eastern Counties Railw. Co.*
v. Broom, 6 Exch. 314; 15 Jur. 297; 20 Law J. Exch. 196
 as to arrest of passengers without the authority of the com-
 pany.)

By a special act, a company was empowered to make by-
 laws for the good government of the company, and for the
 good and orderly using the navigation, also for the well
 governing of the bargemen, &c., who carry goods upon
 any part of such navigation, and impose such fines up-
 on all persons offending against by-laws, as to the major part
 of the company should seem meet, not exceeding 5*l.*: it was
 held, that this power did not authorize the company to make
 a by-law for closing the navigation on every Sunday
 throughout the year, or for limiting the business to be trans-
 acted on the navigation to works of necessity, except for the
 purpose of going to or returning from any place of divine
 worship, under a penalty of 5*l.* (*Calder and Hebble *Navi-*
gation Co. v. Pelling, 14 Mees. & W. 209; 3 Railw. C.
 735.) (1)

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(1) Where the entrance of inn-keepers, or their servants, into a
 Rail Road depot, to solicit passengers to go to their inns, is an an-
 noyance to passengers, or a hindrance and interruption to the Rail
 Road officers in the performance of their duties, the superintend-
 ent of the depot, may make regulations to exclude persons from
 going into the depot for such purpose; and if they, after no-
 tice of such regulations, attempt to violate them, and after notice to
 leave the depot, refuse so to do, he and his assistants may forcibly
 remove them, using no more force than is necessary for that pur-
 pose. (*Commonwealth v. Power*, 7 Met. 596.)

Right of Rail
 Road Com-
 pany to pre-
 scribe regu-
 lations to
 such persons
 as use Rail
 Roads or its
 depots, and
 to exclude
 visitors.

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A Rail Road Corporation has authority to make and carry into effect, reasonable regulations for the conduct of all persons using the Rail Road or resorting to its depots, without prescribing such regulations by the by-laws; and the superintendent of a Rail Road depot appointed by the corporation, has the same authority by delegation. (*Ib.*)

By the rules of a Rail Road Company, the purchasers of tickets for a passage on the road from one place to another, were required to go through in the same train; and passengers, who were to stop on the road, and afterwards finish their passage in another train, were required to pay more than when they were to go through in the same train. A., not knowing these rules, purchased a ticket for a passage from D. to B., and entered the cars with an intention to stop at E., an intermediate place, and go to B. in the next train. When he took his ticket he was informed of the rule, that required him to go through in the same train; and a check was given him, on which were the words "good for this trip only." The conductor then offered to pay him back the money, which A. had paid, deducting the amount of the passage from D. to E., which he refused to accept, and demanded the ticket in exchange for the check. A. stopped at E. and went on to B. on the same day in the next train, and offered his check which was refused, and he was obliged to pay the price of a passage from E. to B. and afterwards brought his action to recover back the money, and for breach of contract. Held, that the action could not be maintained. (*Cheney v. Boston & Maine Rail Road Co.*, 11 Met 121)

The superintendent of a Rail Road depot has not a right to order a person to leave the depot, and not come there any more, and to remove him by force, if he does come, *merely because such person, in the judgment of the superintendent, and without proof of the fact, had violated the regulations established by the Rail Road corporation; or had conducted himself offensively towards the superintendent.* (*Hall v. Power*, 12 Met, 482.)

Fines for
breach of
such by-
laws.

CXXV. It shall be lawful for the company, by such by-laws, to impose such reasonable penalties upon all persons, being officers or servants of the company, offending against such by-laws, as the company think fit, not exceeding five pounds for any offence.

By-laws to
be so framed,
as that pen-

CXXVI. All the by-laws to be made by the company shall be so framed as to allow the justice before whom any

penalty imposed thereby may be sought to be recovered to order a part only of such penalty to be paid, if such justice shall think fit.

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CXXVII. The production of a written or printed copy of the by-laws of the company, having the common seal of the company affixed thereto, shall be sufficient evidence of such by-laws in all cases of prosecution under the same.

alties may be mitigated.

Evidence of by-laws.

Arbitration.

And with respect to the settlement of disputes by arbitration, be it enacted as follows :

CXXVIII. When any dispute, authorized or directed by this or the special act, or any act incorporated therewith, to be settled by arbitration, shall have arisen, then unless both parties shall concur in the appointment of a single arbitrator. each party, on the request of the other party, shall by writing under his hand nominate and appoint an arbitrator to whom such dispute shall be referred ; and after any such appointment shall have been made, neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as such revocation ; and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing shall have been served by the one party on the other party to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then upon such failure the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters which shall be in dispute ; and in such case the award or determination of such single arbitrator shall be final (*f*.)

Where questions are to be determined by arbitration, arbitrators to be appointed within fourteen days after notice.

(*f*) See 8 & 9 Vict. c. 20, s. 126.

*CXXIX. If before the matters so referred shall be determined any arbitrator appointed by either party die, or become incapable or refuse or for seven days neglect to act as arbitrator, the party by whom such arbitrator was appointed may nominate and appoint in writing some other person to act in his place ; and if for the space of seven days after notice in writing from the other party

Vacancy of arbitrator to be supplied.

[*209]

8 & 9 VICT. c. 16
Sect. 130. for that purpose he fail to do so, the remaining or other arbitrator may proceed *ex parte*; and every arbitrator so to be substituted as aforesaid, shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death, refusal, or disability as aforesaid (*g*.)

(*g*) See 8 & 9 Vict. c. 20, s. 127.

Appointment
of umpire.

CXXX. Where more than one arbitrator shall have been appointed, such arbitrators shall before they enter upon the matters referred to them, nominate and appoint by writing under their hands an umpire to decide on any such matters on which they shall differ; and if such umpire shall die, or refuse or for seven days neglect to act, they shall forthwith after such death, refusal or neglect, appoint another umpire in his place; and the decision of every such umpire on the matters so referred to him shall be final (*h*)

(*h*) See 8 & 9 Vict. c. 20, s. 128.

Board of
Trade em-
powered to
appoint an
umpire, on
neglect of the
arbitrators
in case of
railway com-
panies.

CXXXI. If in either of the cases aforesaid the said arbitrators shall refuse, or shall, for seven days after request of either party to such arbitration, neglect to appoint an umpire, it shall be lawful for the Board of Trade, if they think fit, in any case in which a railway company shall be one party to the arbitration, on the application of either party to such arbitration, to appoint an umpire; and the decision of such umpire on the matters on which the arbitrators shall differ shall be final (*i*.)

(*i*) See 8 & 9 Vict. c. 20, s. 129.

Power of ar-
bitrators to
call for books
&c.

CXXXII. The said arbitrators or their umpire may call for the production of any documents in the possession or power of either party which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses *on oath, and administer the oaths necessary for that purpose (*k*.)

[*210]

(*k*) See 8 & 9 Vict. c. 20, s. 133.

Costs to be in
the discretion
of the arbitra-
tors.

CXXXIII. Except where by this or the special act, or any act incorporated therewith, it shall be otherwise provided, the costs of and attending every such arbitration to be determin-

ed by the arbitrators shall be in the descretion of the arbitrators or their umpires, as the case may be (*l*). 8 & 9 Vict. c. 16.

Sect. 134.

(*l*) See 8 & 9 Vict. c. 20, s. 135.

CXXXIV. The submission to any such arbitration may be made a rule of any of the superior courts, on the application of either of the parties (*m*). Submission to arbitration to be made rule of court.

(*m*) See 8 & 9 Vict. c. 20, s. 136.

[210]

Giving of Notices.

And with respect to the giving of notices, be it enacted as follows :

CXXXV. Any summons or notice, or any writ, or other proceeding at law or in equity, requiring to be served upon the company may be served by the same being left at, or transmitted through the post directed to the principal office of the company, or one of their principal offices where there shall be more than one, or being given personally to the secretary, or in case there be no secretary, then by being given to any one director of the company (*n*). Service of notices upon company.

(*n*) See 8 & 9 Vict. c. 20, s. 138. In ejectment to recover land forming part of the bed of a canal in the occupation of an incorporated company, service of the declaration on the clerk of the company at their office is sufficient for a rule nisi. (*Doe d. Fisher v. Roe*, 3 Railw. C. 145; see *Anon.*, 2 Chit. 181; *Tupper v. Doe*, 1 Barnes, 181.)

Personal service of a declaration in ejectment on the secretary of a railway company who are in possession of the land sought to be recovered was under this section sufficient for a rule absolute for judgment against the casual ejector. (*Doe d. Burgess v. Roe*, 4 Dowl. & L. 311; *Doe d. Bayes v. Roe*, 16 Mees. & W. 98.)

The Caledonian Railway is situated in Scotland, with the exception of six miles which lie in Cumberland. The Railway Company's Act incorporates so much of this act and the Scotch Companies Clauses Act, 8 & 9 Vict. c. 17, as may be necessary for carrying into effect the object and purposes of

8 & 9 VICT.
c. 16.

Sect. 136.

[*211]

the act in relation to the English portion of the railway. The plaintiff having a claim against the company in respect *of the amalgamation of a Scotch Company with the Caledonian Railway, served a writ of summons upon the secretary of the company in London: it was held, that the company filled the double character of a Scotch or English railway company, and that the service was regular. (*Wilson v. Caledonian Railway Company*, 5 Exch. 822; 1 Prac. Rep. 731; 15 Jur. 17; 20 L. J., Exch., 6.)

Service by
company on
shareholders.

CXXXVI. Notices requiring to be served by the company upon the shareholders may, unless expressly required to be served personally, be served by the same being transmitted through the post directed according to the registered address or other known address of the shareholder, within such period as to admit of its being delivered in the due course of delivery within the period (if any) prescribed for the giving of such notice; and in proving such service it shall be sufficient to prove that such notice was properly directed, and that it was so put into the post office.

Notices to*
joint propri-
etors of
shares.

CXXXVII. All notices directed to be given to the shareholders shall, with respect to any share to which persons are jointly entitled, be given to whichever of the said persons shall be named first in the register of shareholders; and notice so given shall be sufficient notice to all the proprietors of such share.

Notices by
advertis-
ement.

CXXXVIII. All notices required by this or the special act, or any act incorporated therewith, to be given by advertisement, shall be advertised in the prescribed newspaper, or if no newspaper be prescribed, or if the prescribed newspaper cease to be published, in a newspaper circulating in the district within which the company's principal place of business shall be situated.

Authentica-
tion of noti-
ces.

CXXXIX. Every summons, notice, or other such document requiring authentication by the company, may be signed by two directors, or by the treasurer or the secretary of the company, and need not be under the common seal of the company, and the same may be in writing or in print, or partly in writing and partly in print.

Proof of debts
in bankruptcy.

CXL. And be it enacted, that if any person against whom

the company shall have any claim or demand become bankrupt, or take the benefit of any act for the relief of insolvent debtors, it shall be lawful for the secretary or treasurer of the company, in all proceedings against the estate of such bankrupt or insolvent, or under any fiat, sequestration, or act of insolvency against such bankrupt or insolvent, to represent *the company, and act in their behalf, in all respects as if such claim or demand had been the claim or demand of such secretary or treasurer, and not of the company.

8 & 9 Vict.
c. 16.
Sect. 141.

[*212]

Amends and Payment into Court.

CXLI. And be it enacted, that if any party shall have committed any irregularity, trespass, or other wrongful proceeding in the execution of this or the special act, or by virtue of any power or authority thereby given, and if, before action brought in respect thereof, such party make tender of sufficient amends to the party injured, such last-mentioned party shall not recover in any such action; and if no such tender shall have been made it shall be lawful for the defendant, by leave of the court where such action shall be pending, at any time before issue joined, to pay into court such sum of money as he shall think fit; and thereupon such proceedings shall be had as in other cases where defendants are allowed to pay money into court (n).

Tender of
amends.

(n) See *Kent v. Great Western Railway Co.*, 3 C. B. 714; 8 & 9 Vict. c. 18, s. 135; 8 & 9 Vict. c. 20, s. 139.

Recovery of Damages and Penalties.

And with respect to the recovery of damages not specially provided for, and penalties, be it enacted as follows:

CXLII. In all cases where any damages, costs, or expenses are by this or the special act, or any act incorporated therewith, directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount, in case of dispute, shall be ascertained and determined by two justices; and if the amount so ascertained be not paid by the company or other party liable to pay the same within seven days after demand, the amount may

Provision for
damages not
otherwise
provided for.

8 & 9 Vict.
c. 16.
Sect. 143.

be recovered by distress of the goods of the company or other party liable as aforesaid; and the justices by whom the same shall have been ordered to be paid, or either of them, on application, shall issue their or his warrant accordingly (*o*).

(*o*) See 8 & 9 Vict. c. 20, s. 140.

Distress against the treasurer.

[*213]

CXLIII. If sufficient goods of the company cannot be found whereon to levy any such damages, costs, or *expenses, payable by the company, the same may, if the amount thereof do not exceed twenty pounds, be recovered by distress of the goods of the treasurer of the company; and the justices aforesaid, or either of them, on application, shall issue their or his warrant accordingly; but no such distress shall issue against the goods of such treasurer unless seven days previous notice in writing, stating the amount so due, and demanding payment thereof, have been given to such treasurer, or left at his residence; and if such treasurer pay any money under such distress as aforesaid, he may retain the amount so paid by him, and all costs and expenses occasioned thereby, out of any money belonging to the company coming into his custody or control, or he may sue the company for the same (*p*).

(*p*) See 8 & 9 Vict. c. 20, s. 141.

Method of proceeding before justices in questions of damages, &c.

CXLIV. Where in this or the special act, or any act incorporated therewith, any question of compensation, expenses, charges, or damages (*q*) is referred to the determination of any one justice, or more, it shall be lawful for any justice, upon the application of either party, to summon the other party to appear before one justice, or before two justices, as the case may require, at a time and place to be named in such summons; and upon the appearance of such parties, or in the absence of any of them, upon proof of due service of the summons, it shall be lawful for such one justice, or such two justices, as the case may be, to hear and determine such question, and for that purpose to examine such parties or any of them, and their witnesses, on oath; and the costs of every such inquiry shall be in the discretion of such justices, and they shall determine the amount thereof (*r*).

(*q*) 8 & 9 Vict. c. 20, s. 142, has in addition the words "or other matter."

(*r*) See 8 & 9 Vict. c. 20, s. 142.

CXLV. The company shall publish the short particulars of the several offences for which any penalty is imposed by this or the special act or any act incorporated therewith, or by any by-law of the company affecting other persons than the shareholders, officers, or servants of the company, and of the amount of every such penalty, and shall cause such particulars to be painted on a board, or printed upon paper and pasted thereon, and shall cause such board to be hung up or affixed on some conspicuous part of the principal place of business of the company, and where any such penalties are of local application shall cause such boards to be affixed in some conspicuous place in the immediate neighborhood to which such penalties are applicable or have reference; and such particulars shall be renewed as often as the same or any part thereof is obliterated or destroyed; and no such penalty shall be recoverable unless it shall have been published and kept published in the manner hereinbefore required (s).

8 & 9 Vict.
c. 16.

Sect 145.

Publication
of penalties.

[*214]

(s) See s. 124, *ante*, p. 206, 8 & 9 Vict. c. 20, s. 143.

CXLVI. If any person pull down or injure any board put up or affixed as required by this or the special act, or any act incorporated therewith, for the purpose of publishing any by-law or penalty, or shall obliterate any of the letters or figures thereon, he shall forfeit for every such offence a sum not exceeding five (*t*) pounds, and shall defray the expenses attending the restoration of such board (*u*).

Penalty for
defacing
boards used
for such pub-
lication.

(*t*) Sic.

(*u*) See 8 & 9 Vict. c. 20, s. 144.

CXLVII. Every penalty or forfeiture imposed by this or the special act, or any act incorporated therewith, or by any by-law made in pursuance thereof, the recovery of which is not otherwise provided for, may be recovered by summary proceeding before two justices; and on complaint being made to any justice he shall issue a summons, requiring the party complained against to appear before two justices at a time and place to be named in such summons: and every such summons shall be served on the party offending, either in person or by leaving the same with some inmate

Penalties to
be summarily
recovered
before two
justices.

8 & 9 VICT.

c. 16.

Sect. 148.

at his usual place of abode; and upon the appearance of the party complained against, or in his absence, after proof of the due service of such summons, it shall be lawful for two justices to proceed to the hearing of the complaint, and that although no information in writing or in print shall have been exhibited before them, and upon proof of the offence, either by the confession of the party complained against, or upon the oath of one credible witness or more, it shall be lawful for such justices to convict the offender, and upon such conviction to adjudge the offender to pay the penalty or forfeiture incurred, as well as such costs attending the conviction as such justices shall think fit (*v*).

(*v*) See 8 & 9 Vict. c. 20, s. 145.

Penalties
may be levied
by distress

[*215]

*CXLVIII. If forthwith upon any such adjudication as aforesaid, the amount of the penalty or forfeiture, and of such costs as aforesaid, be not paid, the amount of such penalty and costs shall be levied by distress; and such justices, or either of them, shall issue their or his warrant of distress accordingly (*w*).

(*w*) See 8 & 9 Vict. c. 20, s. 146.

Imprison-
ment in de-
fault of dis-
tress.

CXLIX. It shall be lawful for any such justice to order any offender so convicted as aforesaid, to be detained and kept in safe custody until return can be conveniently made to the warrant of distress to be issued for levying such penalty or forfeiture and costs, unless the offender give sufficient security, by way of recognizance, or otherwise, to the satisfaction of the justice, for his appearance before him on the day appointed for such return, such day not being more than eight days from the time of taking such security; but if before issuing such warrant of distress it shall appear to the justice by the admission of the offender or otherwise, that no sufficient distress can be had within the jurisdiction of such justice whereon to levy such penalty or forfeiture, and costs, he may if he thinks fit, refrain from issuing such warrant of distress; and in such case, or if such warrant shall have been issued, and upon the return thereof such insufficiency as aforesaid shall be made to appear to the justice, then such justice shall by warrant, cause such offender to be committed to jail,

there to remain without bail for any term not exceeding three months, unless such penalty or forfeiture, and costs be sooner paid and satisfied. (x).

8 & 9 VICT.
c. 16
Sect. 150.

(x) See 8 & 9 Vict. c. 20, s. 147.

CL. Where in this or the special act, or any act incorporated therewith, any sum of money whether in the nature of a penalty or otherwise, is directed to be levied by distress, such sum of money shall be levied by distress and sale of the goods and chattels of the party liable to pay the same; and the overplus arising from the sale of such goods and chattels, after satisfying such sum of money, and the expenses of the distress and sale, shall be returned, on demand, to the party whose goods shall have been distrained (y).

Distress how
to be levied.

(y) See 8 & 9 Vict. c. 20, s. 148. It seems that a formal demand is necessary before an action can be maintained under this section for the overplus, and that an improper tender *will not make such demand unnecessary. (*Simpson v. Routh*, 2 B. & C. 682; 4 D. & R. 181; *Philip v. Donate*, 2 Taunt. 62.)

[*216]

CLI. No distress levied by virtue of this or the special act, or any act incorporated therewith, shall be deemed unlawful, nor shall any party making the same, be deemed a trespasser, on account of any defect or want of form in the summons, conviction, warrant of distress, or other proceeding relating thereto, nor shall such party be deemed a trespasser ab initio on account of any irregularity afterwards committed by him, but all persons aggrieved by such defect or irregularity may recover full satisfaction for the special damage in action upon the case (z).

Distress not
unlawful for
want of form.

(z) See 8 & 9 Vict. c. 20, s. 149.

CLII. The justices by whom any such penalty or forfeiture shall be imposed may, where the application thereof is not otherwise provided for, award not more than one half thereof to the informer, and shall award the remainder to the overseers of the poor of the parish in which the offence shall have been committed, for the benefit of the poor of such parish; or if the place wherein the offence shall have been committed shall be extra parochial, then such justices shall direct such remainder to be applied

Application
of penalties.

8 & 9 VICT. c. 16. for the benefit of the poor of such extra-parochial place, or of
 Sect. 153. any adjoining parish or district, and shall order the same to be paid over to the proper officer for that purpose (a).

(a) See 8 & 9 Vict. c. 20, s. 150.

Penalties to be sued for within six months.

CLIII. No person shall be liable to the payment of any penalty or forfeiture imposed by virtue of this or the special act, or any act incorporated therewith, for any offence made cognizable before a justice, unless the complaint respecting such offence shall have been made before such justice within six months next after the commission of such offence (b).

(b) See 8 & 9 Vict. c. 20, s. 151.

Damage to be made good in addition to penalty.

[*217]

CLIV. If through any act, neglect or default on account whereof any person shall have incurred any penalty imposed by this or the special act, or any act incorporated therewith, any damage to the property of the company shall have been committed by such person, he shall be liable to make good such damage, *as well as to pay such penalty: and the amount of such damages shall, in case of dispute, be determined by the justices by whom the party incurring such penalty shall have been convicted; and on non-payment of such damages on demand, the same shall be levied by distress, and such justices, or one of them, shall issue their or his warrant accordingly (c).

(c) See 8 & 9 Vict. c. 20, s. 152.

Penalty on witnesses making default.

CLV. It shall be lawful for any justice to summon any person to appear before him as a witness in any matter in which such justice shall have jurisdiction under the provisions of this or the special act, or any act incorporated therewith, at a time and a place mentioned in such summons, and to administer to him an oath to testify the truth in such matter; and if any person so summoned shall without reasonable excuse, refuse or neglect to appear at the time and place appointed for that purpose, having been paid or tendered a reasonable sum for his expenses, or if any person appearing shall refuse to be examined upon oath or to give evidence before such justice, every such person shall forfeit a sum not exceeding five pounds for every such offence. (d).

(d) See 8 & 9 Vict. c. 20, s. 153.

CLVI. It shall be lawful for any officer or agent of the company, and all persons called by him to his assistance, to seize and detain any person who shall have committed any offence against the provisions of this or the special act, or any act incorporated therewith, and whose name and residence shall be unknown to such officer or agent, and convey him with all convenient dispatch, before some justice, without any warrant or other authority than this or the special act; and such justice shall proceed with all convenient dispatch to the hearing and determining of the complaint against such offender (*e*).

8 & 9 Vict.
c. 16.

See 156.

Transient offenders.

(*e*) See 8 & 9 Vict. c. 20 s. 154.

CLVII. The justices before whom any person shall be convicted of any offence against this or the special act, or any act incorporated therewith, may cause the conviction to be drawn up according to the form in the schedule (G) to this act annexed (*f*).

Form of conviction.

(*f*) See form in the Appendix.

*CLVIII. No proceeding in pursuance of this or the special act, or any act incorporated therewith, shall be quashed or vacated for want of form nor shall the same be removed by certiorari or otherwise into any of the superior courts (*g*).

Proceedings not to be quashed for want of form, [*218]

(*g*) See 8 & 9 Vict. c. 20, s. 156.

Appeal to Quarter Sessions.

CLIX. If any party shall feel aggrieved by any determination or adjudication of any justice, with respect to any penalty or forfeiture under the provisions of this or the special act, or any act incorporated therewith, such party may appeal to the general quarter sessions for the county or place in which the cause of appeal shall have arisen; but no such appeal shall be entertained unless it be made within four months next after the making of such determination or adjudication, nor unless ten days notice in writing of such appeal, stating the nature and grounds thereof, be given to the party against whom the appeal shall be brought, nor unless the appellant forthwith after such notice enter into recognizances, with two sufficient sureties before a justice,

Parties allowed to appeal to quarter sessions on giving security,

8 & 9 Vict. c. 16.
 Sec. 159. conditioned duly to prosecute such appeal, and to abide the order of the court thereon (h).

(h) See 8 & 9 Vict. c. 18, s. 146; 8 & 9 Vict. c. 20, s. 157.

Court to
 make such
 order as they
 think reason-
 able.

CLX. At the quarter sessions for which such notice shall be given, the court shall proceed to hear and determine the appeal in a summary way, or they may, if they think fit, adjourn it to the following sessions; and upon the hearing of such appeal, the court may, if they think fit, mitigate any penalty or forfeiture, or they may confirm or quash the adjudication, and order any money paid by the appellant, or levied by distress upon his goods, to be returned to him, and may also order such further satisfaction to be made to the party injured as they may judge reasonable; and they may make such order concerning the costs, both of the adjudication and of the appeal, as they may think reasonable (i).

(i) See 8 & 9 Vict. c. 20, s. 158.

Access to Special Act.

And with respect to the provision to be made for affording access to the special act by all parties interested; be it enacted as follows :

Copies of
 special act to
 be kept and
 deposited, &
 allowed to be
 inspected.

[*219]

*CLXI. The company shall at all times after the expiration of six months after the passing of the special act, keep in their principal office of business a copy of the special act, printed by the printers to her majesty or some of them; and where the undertaking shall be a railway, canal or other like undertaking, the works of which shall not be confined to one town or place, shall also, within the space of such six months deposit in the office of each of the clerks of the peace of the several counties into which the works shall extend, and in the office of the town clerk of every burgh or city into which or within one mile of which the works shall extend, a copy of such special act so printed as aforesaid; and the said clerks of the peace and town clerks shall receive, and they and the company respectively shall retain, the said copies of the special act, and shall permit all persons interested to inspect the same, and make extracts or copies therefrom, in the like manner and upon the like terms, and under the like penalty for default as is provided in the case of certain plans and sections, by an act passed in the first year of the reign of her

present majesty, entitled "An Act to compel Clerks of the Peace for Counties and other Persons to take the custody of such Documents as shall be directed to be deposited with them under the standing orders of either House of Parliament (*k*). 8 & 9 Vict.
c. 16.
Sect. 161.

(*k*) See 8 & 9 Vict. c. 18, s. 150; and 8 & 9 Vict. c. 20, s. 162. By 1 Vict. c. 83, s. 2, the clerks of the peace and town clerks are required, at all reasonable hours of the day to permit all persons interested to inspect, during a reasonable time, the documents thereby directed to be deposited with them respectively, on payment by each person to the clerk of the peace or town clerk of one shilling for every such inspection, and the further sum of one shilling for every hour during which such inspection shall continue after the first hour, and after, the rate of sixpence for every hundred words copied therefrom. Any clerk of the peace or town clerk not complying with the provisions of that act are liable to a penalty of 5*l.*, which, with costs, is recoverable by warrant of distress under the hand of one justice, and payable to the complainant. The complaint is to be determined on summons by one justice, although no information in writing or in print shall have been exhibited. (1 Vict. c. 83, s. 3.)

CLXII. If the company shall fail to keep or deposit as hereinbefore mentioned any of the said copies of the special act, they shall forfeit twenty pounds for *every such offence, and also five pounds for every day afterwards during which such copy shall not be so kept or deposited (*l*). Penalty on
company
failing to
keep or de-
posit such
copies.
[*220]

(*l*) 8 & 9 Vict. c. 18, s. 151; 8 & 9 Vict. c. 20, s. 163.]

CLXIII. And be it enacted, that this act shall not extend to Scotland (*m*). Act not to
extend to
Scotland.

(*m*.) See 8 & 9 Vict. c. 18, s. 152; 8 & 9 Vict. c. 20, s. 164. The Companies Clauses Consolidation (Scotland) Act, 1845, is 8 & 9 Vict. c. 17, (which passed on 8th May, 1845,) and is entitled "An Act for Consolidating in one act certain

8 & 9 VICT.
c. 16.
Sect 164

provisions usually inserted in acts with respect to the Constitution of companies incorporated for carrying on undertakings of a public nature in Scotland."

Recovery of Calls against Shareholders in Scotland.

For recovering calls against shareholders residing in Scotland.

[220]

CLXIV. Provided always, and be it enacted, that if any shareholder residing in Scotland shall fail to pay the amount of any call made upon him by the company in respect of any share held by him, it shall be lawful for the company to proceed against him in Scotland, and to sue for and recover the amount of such call, or to declare such share forfeited in such manner as is by "The Companies Clauses Consolidation (Scotland) Act, 1845," in case the same shall pass into a law provided in regard to shareholders of any company in Scotland (n).

Security for costs.

(n) The plaintiffs, an Irish Railway Company, incorporated by act of parliament, whose concerns were all carried on in Ireland, were compelled to give security for costs in action for calls on shares, notwithstanding an affidavit that they had money in a banker's hands in London. (*Limerick and Waterford Railw. Co. v. Fraser*, 4 Bing. 394; 1 M. & P. 23.) An Irish railway company, carrying on business at Westminster, was compelled to give security for costs, though it had personal property in England, and most of its shareholders resided there. (*Kilkenny & Co., Railw. Co. v. Fielden*, 6 Railw. C., 785.) A defendant is entitled to security for costs from a plaintiff resident out of the jurisdiction, although he has no defence on the merit. The possession of money and exchequer bills within the jurisdiction will not relieve a plaintiff resident out of the jurisdiction from giving security for costs, notwithstanding the stat. 1 & 2 Vict. c. 110, s. 12, which renders such property liable to execution. A defendant does not preclude himself from applying for security for costs, by agreeing before issue joined, to take short notice of trial generally, and not for a specific day. (*Edinburgh & Leith Railw. Co. v. Dawson*, 7 Dowl. 573; 3 Jur. 55).

See schedules to this statute in the Appendix.

*LANDS CLAUSES CONSOLIDATION
ACT, 1845.

[*221]

8 & 9 VICTORIA, c. 18.

An Act for consolidating in One Act certain Provisions usually inserted in Acts authorizing the taking of Lands for Undertakings of a Public Nature.

8 & 9 VICT.
c. 18

[8th May, 1845.]

Application of Act to future Incorporated Companies.

WHEREAS it is expedient to comprise in one general act sundry provisions usually introduced into acts of parliament relative to the acquisition of lands required for undertakings or works of a public nature, and to the compensation to be made for the same, and that as well for the purpose of avoiding the necessity of repeating such provisions in each of the several acts relating to such undertakings as for ensuring greater uniformity in the provisions themselves: Be it therefore enacted, that this act shall apply to every undertaking authorized by any act which shall hereafter be passed, and which shall authorize the purchase or taking of lands for such undertaking, and this act shall be incorporated with such act; and all the clauses and provisions of this act, save so far as they shall be expressly varied or excepted by any such act, shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other act which shall be incorporated with such act, form part of such act, and be construed together therewith, as forming one act. (1)

Act to apply
to all under-
takings au-
thorized by
acts hereafter
to be passed.

(1) A Railway Act, passed in 1844, under which certain lands were taken. Afterwards, in 1845, the land clauses act passed, and in 1847 a second railway act was passed, extending the first act; *held*,

8 & 9 VICT.
c 18

Sect 2.

that the land clauses act applied to the whole undertaking, and became consolidated with the act of 1844 and 1847, and that the owner of lands taken under the first act of 1844 became entitled to the benefit of its provisions. (*The Lancashire and Yorkshire Railw. Co. v. Evans*, 19 Eng. Law and Eq. 295.

Definition of Words.

Interpreta-
tions in this
act.

And with respect to the construction of this act and of acts to be incorporated therewith, be it enacted as follows :

" Special
act."

[*222]

" Pre-
scribed."

II. The expression "the special act," used in this *act shall be construed to mean any act which shall be hereafter passed which shall authorize the taking of lands for the undertaking to which the same relates, and with which this act shall be so incorporated as aforesaid; and the word "prescribed," used in this act in reference to any matter herein stated, shall be construed to refer to such matter as the same shall be prescribed or provided for in the special act, and the sentence in which such word shall occur shall be construed as if, instead of the word "prescribed," the expression "prescribed for that purpose in the special act" had been used; and the expression "the works" or "the undertaking" shall mean the works or undertaking, of whatever nature, which shall by the special act be authorized to be executed; and the expression "the promoters of the undertaking" shall mean the parties, whether company, undertakers, commissioners, trustees, corporations, or private persons, by the special act empowered to execute such works or undertaking.

" The works."

" Promoters
of the under-
taking."

Interpreta-
tions in this
and the spe-
cial act.

III. The following words and expressions both in this and the special act shall have the several meanings hereby assigned to them, unless there be something either in the subject or context repugnant to such construction ; (that is to say,)

Number.

Words importing the singular number only shall include the plural number, and words importing the plural number only shall include the singular number :

Gender.

Words importing the masculine gender only shall include females :

" Lands."

The word "lands" shall extend to messuages, lands, tenements, and hereditaments of any tenure :

The word "lease" shall include an agreement for a lease : 8 & 9 Vict.
c. 18.

The word "month" shall mean calendar month :

Sect. 3.

The expression "superior courts" shall mean her majesty's superior courts of record at Westminster or Dublin, as the case may require : " Lease."
" Month."
" Superior
Courts."

The word "oath" shall include affirmation in the case of Quakers, or other declaration lawfully substituted for an oath in the case of any other persons exempted by law from the necessity of taking an oath (a) :

The word "county" shall include any riding or other like division of a county, and shall also include county of a city or county of a town (b) :

*The word "sheriff" shall include undersheriff, or other legal competent deputy (c); and where any matter in relation to any lands is required to be done by any sheriff, or by any clerk of the peace, the expression "the sheriff," or the expression "the clerk of the peace," shall in such case be construed to mean the sheriff or the clerk of the peace of the county, city, borough, liberty, cinque port, or place where such lands shall be situate ; and if the lands in question, being the property of one and the same party, be situate not wholly in one county, city, borough, liberty, cinque port, or place, the same expression shall be construed to mean the sheriff or clerk of the peace of any county, city, borough, liberty, cinque port, or place where any part of such lands shall be situate (d) : " The she-
riff."
[*223]
" The clerk
of the peace."

The word "justices" shall mean justices of the peace acting for the county, city, liberty, cinque port, or place where the matter requiring the cognizance of any such justice shall arise, and who shall not be interested in the matter ; and where such matter shall arise in respect of lands being the property of one and the same party, situate not wholly in any one county, city, borough, liberty, cinque port, or place, the same shall mean a justice acting for the county, city, borough, liberty, cinque port, or place where any part of such land shall be situate, and who shall not be interested in such " Justices."

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c 18

Sect 3
"Two justices."

"Owner."

matter; and where any matter shall be authorized or required to be done by two justices, the expression "two justices" shall be understood to mean two justices assembled and acting together (e):

Where under the provisions of this or the special act, or any act incorporated therewith, any notice shall be required to be given to the owner of any lands, or where any act shall be authorized or required to be done with the consent of any such owner, the word "owner" shall be understood to mean any person or corporation who, under the provisions of this or the special act, would be enabled to sell and convey lands to the promoters of the undertaking (f).

"The bank."

The expression "the bank" shall mean the Bank of England where the same shall relate to monies to be paid or deposited in respect of lands situate in England, and shall mean the Bank of Ireland *where the same shall relate to monies to be paid or deposited in respect of lands situate in Ireland (g).

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(a) See *ante*, p. 83, n. (d).

(b) These terms are to receive the same construction in 8 & 9 Vict. c. 16. s. 3, and in 8 & 9 Vict. c. 20, s. 3. (See s. 39, *post*; *Worsley v. South Devon Railw. Co.*, 20 Law J. Q. B. 254.)

(c) Throughout the enactments contained in this act relating to the reference to a jury, where the term "sheriff" is used, the provision applicable thereto shall be held to apply to every coroner or other person lawfully acting in his place (See sect. 40 and note, *post*.)

(d) The land injuriously affected by a railway company was divided from the railway works by a river. The land was in the city; the works were not. The mode in which the works injuriously affected the land was, that they obstructed the access to a ferry over the river, and appurtenant to the land in question: it was held, that as the land lay in the city, the inquisition was rightly taken there. (*Reg v. Great Northern Railw. Co.*, 14 Q. B. 25; 6 Railw. C. 346.)

(e) See *ante*, p. 84, n. f. See s. 33, n. *post*.

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(f) By the 79th section, the party in possession is in some cases to be deemed owner in questions arising respecting the title to lands in respect whereof monies have been paid.

c. 18.

Sect. 4.

The words "owner" or "proprietor" are not legal terms, but words of common parlance. By "owner" is not necessarily meant a tenant in fee simple, but the word is commonly used to express, generally, a person who receives beneficial returns from the land; the tenant in fee simple may have scarcely any beneficial interest in the land. The same observations apply to the word "proprietor;" any person who has a beneficial interest in the land was held to be within the words of an act, "making satisfaction to the owners or proprietors of all private lands, &c. taken, or for any loss or damage they may sustain thereby." (*Lister v. Lobley*, 6 Nev. & M. 343; *Chauntler v. Robinson*, 4 Exch. 163; *Russell v. Shenton*, 3 Q. B. 449.)

(g) The words "sheriff," "justices," "two justices," "owner," "the bank," are to be interpreted in the same manner in 8 & 9 Vict. c. 20, s. 3.

IV. That in citing this act in other acts of parliament and in legal instruments, it shall be sufficient to use the expression "The Lands Clauses Consolidation Act, 1845 (*h*)."

Short title of
the act.

(*h*) In reciting a statute in pleading, the whole of its title must be stated, though it comprise several other subject-matters besides that to which the pleadings relates. (*Beck v. Beverley*, 11 Mee. & W. 845.) A wrong description of a *statute may be fatal in pleading. (*Rann v. Green*, Cowp. 474.) A statute passed in a session of parliament commencing in one year of a reign and ending in another is incorrectly described as a statute passed in both years, but it may be described as passed in a session of parliament held in both years. (*Gibbs v. Pike*, Law Journ. 1841, Exch. 309; *Rex v. Biers*, 1 Ad. & E. 327.) See an article on the correct mode of describing a statute, 6 Jur. 111, 112.

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c. 18.

Partial Incorporation with other Acts.

Sect. 5.
Form in
which por-
tions of this
act may be
incorporated
with other
acts.

V. And whereas it may be convenient in some cases to incorporate with acts of parliament hereafter to be passed some portion only of the provisions of this act; be it therefore enacted, that for the purpose of making any such incorporation, it shall be sufficient in any such act to enact that the clauses of this act with respect to the matter so proposed to be incorporated (describing such matter as it is described in this act in the words introductory to the enactment with respect to such matter,) shall be incorporated with such act; and thereupon all the clauses and provisions of this act with respect to the matter so incorporated shall, save so far as they shall be expressly varied or excepted by such act, or part of such act, and such act shall be construed as if the substance of such clauses and provisions were set forth therein with reference to the matter to which such act shall relate.

Purchase of Lands by Agreement.

And with respect to the purchase of lands by agreement, be it enacted as follows:

Power to
purchase
lands by
agreement.

VI. Subject to the provisions of this and the special act it shall be lawful for the promoters of the undertaking to agree with the owners of any lands by the special act authorized to be taken, and which shall be required for the purposes of such act, and with all parties having any estate or interest in such lands, or by this or the special act enabled to sell and convey the same, for the absolute purchase, for a consideration in money, of any such lands, or such parts thereof as they shall think proper, and of all estates and interest in such lands of what kind soever (i).

(i) Nothing is said as to the time when such compensation is to be paid. (Per *Wigram, V. C., Hutton v. London and South Western Railw. Co.*, 7 Hare, 264.).

Parties
under disa-
bility enabled
to sell and
convey.
[*226]

VII. It shall be lawful for all parties being seised, possessed of, or entitled to any such lands, or any *estate or interest therein, to sell and convey or release the same to the promoters of the undertaking, and to enter into all necessary

agreements for that purpose; and particularly it shall be lawful for all or any of the following parties so seised, possessed or entitled as aforesaid so to sell, convey or release; (that is to say,) all corporations, tenants in tail or for life, married women seised in their own right or entitled to dower guardians, committees of lunatics and idiots (*k*), trustees or feoffees in trust for charitable or other purposes, executors and administrators, and all parties for the time being entitled to the receipt of the rents and profits of any such lands in possession or subject to any estate in dower, or to any lease for life, or for lives and years, or for years, or any less interest; and the power so to sell and convey or release as aforesaid may lawfully be exercised by all such parties, other than married women entitled to dower, or lessees for life, or for lives and years, or for years, or for any less interest, not only on behalf of themselves and their respective, heirs, executors, administrators and successors, but also for and on behalf of every person entitled in reversion, remainder or expectancy after them, or in defeasance of the estates of such parties, and as to such married women, whether they be of full age or not, as if they were sole and of full age, and as to such guardians, on behalf of their wards, and as to such committees, on behalf of the lunatics and idiots of whom they are the committees respectively, and that to the same extent as such wives, wards, lunatics and idiots respectively could have exercised the same power under the authority of this or the special act if they had respectively been under no disability, and as to such trustees executors and administrators, on behalf of their cestuique trusts, whether infants, issue unborn, lunatics, femmes covert, or other persons, and that to the same extent as such cestuique trusts respectively could have exercised the same powers under the authority of this and the special act if they had respectively been under no disability.

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Sect. 7.

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(*k*) In the absence of special clauses for that purpose, the effect of a railway act is not to alter the course of devolution of property without the consent of the owner; and therefore if a company, by virtue of their act, contract with an incapacitated person for the purchase of lands, the money is to be considered as real and not as personal estate. A testator

When land taken by railway under verted into personalty.

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devised a piece of land by his will, and soon after became imbecile; while the testator was in this state the Midland Counties Railway Company took this piece of land for the purposes of the railway, and the value of it was ascertained to be 440*l.* by a jury, summoned in pursuance of the act. Before the money was paid into the Bank, in pursuance of the Railway Act, the testator died: it was held, that the land was not converted, as far as the testator's will was concerned, and that the 440*l.* belonged to the devisees of the land. Some of the devisees being infants, and a conveyance of the land being necessary, it was held, that the testator was a vendor within the meaning of the stat. 1 Will. 4, c. 60, s. 16, and the infants were ordered to convey. (*Midland Counties Rail. Co. v. Oswin*, Law. J., 1844, p. 209, Chanc. ; 1 Coll. 80 ; 8 Jur. 138 ; 3 Railw C. 497.)

Money paid into court by a railway company, for land taken under this act, from a person who was in a state of mental imbecility, and who continued in that state until his death, but was not the subject of a commission of lunacy was ordered, after his death, not to be reinvested in or considered as land, but to be paid to his executors. (*East Lincolnshire Railw. Act, In re*, 1 Sim. N. S. 260.)

Money paid into court for land taken under the compulsory powers of the act 5 & 6 Will. 4, c. 69, for a poor law union during the life of a tenant for life, who by the failure of intermediate limitations became tenant in fee simple, passed as real estate to her heir. (*In re Horner's Estate*, 16 Jur. 1063 ; 5 De G. & S. 483.) Where the purchase money of land taken under the compulsory powers of an act of parliament for public purposes is paid into court, subject to be re-invested in the purchase of land, free of expense to the parties beneficially interested, on their petition it is impressed with real uses and is *prima facie* to be treated as real estate. (*In re Stewart's Estates*, 16 Jur. 1063.) If the person absolutely entitled to the money land have a right to

elect to take it as personalty, a mere acquiescence in its remaining invested in consols during his life, and his will, by which he bequeaths personal estate only and does not devise realty, are not such proof of election as to prevent the funds descending on his death to his heirs. (*lb.*)

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c. 18.
Sect. 8.

VIII. The power hereinafter given to enfranchise copyhold lands, as well as every other power required to be exercised by the lord of any manor pursuant to the provisions of this or the special act; or any act incorporated therewith, and the power to release lands from any rent-charge or incumbrance, and to agree for the apportionment of any such rent-charge or incumbrance, shall extend to and may lawfully be exercised by every party hereinbefore enabled to sell and convey or release lands to the promoters of the undertaking (*l.*)

Parties under disability to exercise other powers.

(*l.*) See ss. 96—98, 116, *post.*

IX. The purchase money or compensation to be paid for any lands to be purchased or taken from any party under any disability or incapacity, and not having power to sell or convey such lands except under the provisions of this or the special act, and the compensation to be paid for any permanent damage or injury to any such lands, shall not, except where the same shall have been determined by the verdict of a jury, or by arbitration, or by the valuation of a surveyor appointed by two justices under the provision hereinafter contained, be less than shall be determined by the valuation of two able practical surveyors, one of whom shall be nominated by the promoters of the undertaking, and the other by the other party, and if such two surveyors cannot agree in the valuation, then by such third surveyor as any two justices shall upon application of either party, after notice to the other party, for that purpose nominate; and each of such two surveyors if they agree, or if not then the surveyor nominated by the said justices, shall annex to the valuation a declaration in writing, subscribed by them or him, of the correctness thereof; and all such purchase money or compensation shall be deposited in the Bank for the benefit of the parties interested, in manner hereinafter mentioned (*m.*)

Amount of compensation in case of parties under disability to be ascertained by valuation, and paid into the Bank.

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(*m.*) See s. 82, *post.*, n.

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Where vendor absolutely entitled, lands may be sold on chief rents.

X. It shall be lawful for any person seised in fee of, or entitled to dispose of absolutely for his own benefit, any lands authorized to be purchased for the purposes of the special act, to sell and convey such lands or any part thereof unto the promoters of the undertaking, in consideration of an annual rent-charge payable by the promoters of the undertaking, but, except as aforesaid, the consideration to be paid for the purchase of any such lands, or for any damage done there-to, shall be in a gross sum.

Payment of rents to be charged on rents.

XI. The yearly rents reserved by any such conveyance shall be charged on the tolls or rates, if any, payable under the special act, and shall be otherwise secured in such manner as shall be agreed between the parties, and shall be paid by the promoters of the undertaking as such rents become payable; and if at any time such rents be not paid within thirty days after they so become payable, and after demand thereof in writing, the person to whom any such rent shall be payable may either recover the same from the promoters of the undertaking, with costs of suit, by action of debt in any of the superior courts, or it shall be lawful for him to levy the same by distress of the goods and chattels of the promoters of the undertaking (*n*).

(*n*) By a canal act the company were authorized to take certain lands for the purpose of the act, on making certain payments, either by annual rents or sums in gross, and the persons from whom the land was to be taken were empowered to distrain the goods of the company even off the premises, in case of non-payment of such sums. An avowant stating a distress under that act of parliament was not entitled, on obtaining a verdict, to double costs under the stat. 11 Geo. 2, c. 19, s. 22. (*Leominster Canal Co. v. Norris*, 7 T. R. 500; *Same v. Cowell*, 1 B. & P. 213.)

Power to purchase lands required for additional accommodation

XII. In case the promoters of the undertaking shall be empowered by the special act to purchase lands for *extraordinary purposes, it shall be lawful for all parties who, under the provisions hereinbefore contained, would be enabled to sell and convey lands, to sell and convey the lands so authorized to be purchased for extraordinary purposes.

XIII. It shall be lawful for the promoters of the undertaking to sell the lands which they shall have so acquired for extraordinary purposes, or any part thereof, in such manner, and for such considerations, and to such persons, as the promoters of the undertaking may think fit, and again to purchase other lands for the like purposes, and afterwards sell the same, and so from time to time; but the total quantity of land to be held at any one time by the promoters of the undertaking, for the purposes aforesaid, shall not exceed the prescribed quantity.

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Sect. 13.

Authority to
sell and re-
purchase
such lands.

XIV. The promoters of the undertaking shall not, by virtue of the power to purchase land for extraordinary purposes, purchase more than the prescribed quantity from any party under legal disability, or who would not be able to sell and convey such lands except under the powers of this and the special act; and if the promoters of the undertaking purchase the said quantity of land from any party under such legal disability, and afterwards sell the whole or any part of the land so purchased, it shall not be lawful for any party being under legal disability to sell to the promoters of the undertaking any other lands in lieu of the land so sold or disposed of by them.

Restraint on
purchase
from incap-
acitated per-
sons.

XV. Nothing in this or the special act contained shall enable any municipal corporation to sell for the purposes of the special act, without the approbation of the commissioners of her majesty's treasury of the United Kingdom of Great Britain and Ireland, or any three of them, any lands which they could not have sold without such approbation before the passing of the special act, other than such lands as the company are by the powers of this or the special act empowered to purchase or take compulsorily (o).

Municipal
corporations
not to sell
without the
approbation
of the treasu-
ry.

(o) The council, under the Municipal Corporation Act, are not enabled, without the authority of the lords of the treasury, to sell or to lease corporate property for more than thirty-one years, except for building or improvement, where the lease may be for seventy-five years (5 & 6 Will. 4, c. 76, s. 96); or to mortgage or alienate the real property of the corporation, in the absence of any covenant, contract or agreement, *bona fide* made or entered into previous to the *5th June, 1835, or a resolution entered on the corporation

Power of a-
lienation under
5 & 6
Will. 4, c. 76.

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books previous to that period; and in the leases which the council may make, there must be reserved such rents as to the council shall appear reasonable, without taking any fine for the same. Whenever the council may deem it expedient to sell, alienate, demise, or lease property for a longer time than thirty-one years, they may do so with the consent of the lords of the treasury on the terms approved by them, provided that notice of the intended application of the council for such purpose to the lords of the treasury be fixed on the outer door of the town hall, or in some public situation within the borough for one calendar month before such application, and a copy of the memorial intended to be sent to the lords of the treasury be kept in the town clerk's office during such calendar month and be freely open to the inspection of every burgess. (5 & 6 Will. 4, c. 76, s. 94.) (1)

* Lands purchased by a railroad company upon which their railroad is built may sell the land, or it may be taken on execution.

(1) *Held*, that the Ohio Railroad Company under their charter, might purchase and hold real estate, when necessary, for the procurement of materials, or for the economical construction of the Road. (*Overmyer v. Williams*, 15 Ohio, 26.)

It seems, that lands purchased by a railroad company upon which their road is built, is subject to sale on execution against the company, and may be assigned by them. (*Arthur v. Commercial and Railroad Bank*, 9 Smedes & Marshal, 394.)

Purchase of Lands otherwise than by Agreement.

Capital to be subscribed before compulsory powers of purchase put in force.

And with respect to the purchase and taking of lands otherwise than by agreement, be it enacted as follows (*p*):

XVI. Where the undertaking is intended to be carried into effect by means of a capital to be subscribed by the promoters of the undertaking, the whole of the capital or estimated sum for defraying the expenses of the undertaking shall be subscribed under contract binding the parties thereto, their heirs, executors, and administrators, for the payment of the several sums by them respectively subscribed, before it shall be lawful to put in force any of the powers of this or the special act, or any act incorporated therewith, in relation to the compulsory taking of land for the purposes of the undertaking (*q*).

(p) The whole of this part of the act, beginning at this section and ending at the 68th inclusive, has been considered to form one code on this subject. (*Burkinshaw v. Birmingham and Oxford Junction Railw. Co.*, 6 Railw. C. 609; 5 Exch. 475.)

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The Railways Act, (Ireland) 1851, enacts that the clauses of this act, with respect to the purchase and taking of lands otherwise than by agreement, except sections 16 and 17 of this act, shall not be applicable with respect to any railway, or portion of a railway in Ireland, to which the former act applies. (14 & 15 Vict. c. 70, s. 2. See this act, *post*.)

(q) A writ of mandamus called upon a railway company to take all necessary steps, both as to the purchase of lands and otherwise for making and completing, and to make and complete a railway. The act of parliament authorizing the railway enabled the company to raise the necessary capital *by the creation of shares and by mortgage. There was no allegation in the writ that any money had been raised: it was held, that, assuming this section to apply to the case of an existing railway company obtaining powers to construct additional works, the writ required them to raise the requisite funds, in the mode pointed out by the special act, and that it must be assumed that they had the power of doing so. A return to the writ merely alleging that the company had taken no steps towards making the railway, is no answer. (*Reg. v. Lancashire and Yorkshire Railw. Co.*, 22 Law. J. Q. B. 57, *Erle, J., dissentiente.*) (1)

Cases on
this section.

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(1) Reversed in the Court of Exchequer; see 18 Eng. Law and Eq. 199, S. C.: also the *Great Western Railway Company v. Regina*, 18 Eng. Law and Eq., 211; and *Regina v. the Ambergate &c., Junction Railw. Co.*, same vol., p. 222.)

A mandamus was issued to a railway company to make a branch, authorized by an extension act, which incorporated this act. The return was, that the capital required to make the branch was not subscribed for by any contract according to this section, and that the branch could not be made without the exercise of the compulsory powers to take land: it

8 & 9 VICT. was held, on demurrer, that this section is not applicable to
 c. '18
 Sect. 16. an extension act where the funds are to be furnished by the company, and that even if this section were applicable, the return showed no incapacity to obey the writ, as it did not aver that the defendants were unable to procure the execution of the subscription contract. Although it appeared on the record that the period for the exercise of the compulsory powers had expired since the return and before the judgment a peremptory mandamus was awarded, although since the return compliance had become impossible. (*Reg. v. Great Western Railw. Co.*, 1 Q. B, N. S. 253 ; 22 Law. J. Q. B. 65.)

On a mandamus to make and complete a portion of a railway, it was returned that the whole of the capital required by the company's act had not been subscribed for, and that the company were unable to procure the subscriptions. It was pleaded that the company were estopped from saying that the capital had not been subscribed according to the statute, because on another part of the line they had exercised their compulsory powers. It was held, upon the demurrer to the plea, that the return was a good answer to the writ because this section prohibited the defendants from exercising their compulsory powers until the capital had been subscribed ; and that the exercise of the compulsory powers on another part of the line was *res inter alios acta*, and therefore no estoppel. (*Reg. v. Ambergate, &c. Railw. Co.*, 23 Law T. 246.)

Of compulsory Purchase or taking of Lands.

Private property cannot be taken without authority of parliament.

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So great is the regard of the law for private property, that it will not in general authorize the least violation of it, even for the general good of the whole community. Although public works made through the grounds of a private person, may, perhaps, be extensively beneficial to the public, yet the law permits no man or set of men to do this without *the consent of the owner of the land. If the legislature thinks it expedient to interpose in such cases, it does so, not by absolutely stripping the subject of his property in an arbitrary manner, but by giving him a full indemnification and

equivalent for the injury thereby sustained. The public is now considered as an individual treating with an individual for an exchange. All that the legislature does, is to oblige the owner to alienate his possessions for a reasonable price ; and even this is an exertion of power which, at least until modern times, the legislature has indulged with caution, and which even now nothing but the legislature can perform. See 1 Bl. Com. 139.

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Without the authority of an act of parliament no man can deal with the property of another against the consent of the owner. The authority given by statutes to railway companies to take the lands of individuals, where it is not exercised by consent, is an authority to be carried into effect by means unknown to the common law. (*Taylor v. Clemson*, 3 Railw. C. 90 ; 2 Q. B. R. 978 ; 2 G. & D. 346 ; 8 Jur. 883, H. L. ; 11 Cl. & F. 610.) The owner, if his consent is asked, may demand what price he pleases for that consent ; because having the power absolutely to refuse, he may refuse until his own terms are complied with ; and the price of his consent must be determined by himself, and not by the party with whom he is dealing. (*Barnard v. Wallis*, 2 Railw. C. 177.) Where large powers are entrusted to a company for the promotion of public works, and owners and occupiers of the land are reluctantly compelled to surrender rights or property, it is reasonable and just that a full and liberal compensation should be made to the parties for any injury to the property which can be shown to arise from the prosecution of such works. (2 Railw. C. 752.) But when the propriety of the measure is established, justice and the public interest require that such compensation should be within reason.

In these cases it is always to be borne in mind that the acts of parliament are acts of sovereign and imperial power, operating in the most harsh shape in which that power can be applied in civil matters, solicited as they are for the purpose of private speculation and individual benefit ; they are not passed by the legislature otherwise than in the notion that they contribute to the public good so materially as to

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c. 18.
Sect. 16. make it even for the general benefit to violate the private property of individuals. (Per Lord *Langdale*, M. R., *Gray v. Liverpool and Bury Railw. Co.*, 4 Railw. C. 240.

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The powers given by railway acts to interfere with the public and private rights of individuals are to be looked upon as given in consideration of a public benefit, which, notwithstanding all other sacrifices, is on the whole hoped to be obtained by the public; but the public interest being to protect the private rights of all individuals, and to save them from liabilities beyond those which the powers given by the several acts necessarily occasion, those private rights must *always be carefully looked to. Powers given by such acts extend no further than expressly stated in the act, except where they are necessarily and properly acquired for the purposes which the act has sanctioned. How far these powers may extend, which are necessarily and conveniently to be exercised for the purposes intended by the act, will very often be a subject of difficulty. (*Colman v. Eastern Counties Railw. Co.*, 4 Railw. C. 524.

If it be shown that the plan marked out by parliament cannot be acted on, is there a right to do anything at all with the railway? If it is clear that the object to which parliament intended the railway to be applied—a communication by railway from Liverpool to Bury—cannot be attained, and if it is perfectly clear that a part of the line is cut off and the whole of it cannot be effected, it cannot be intended that, notwithstanding, this railway company, who are authorized to make the whole line for the public benefit, have a right to persist and invade the property of individuals, in order to complete a part only. (Per Lord *Langdale*, M. R., *Gray v. Liverpool and Bury Railw. Co.*, 4 Railw. C. 246.)

Where the construction of an act of parliament under which property is to be compulsorily taken is doubtful, it should be construed most favorably to those who seek to defend their property from invasion. (*Sparrow v. Oxford, Worcester and Wolverhampton Railw. Co.*, 19 Law T. 131; 7 Railw. C. 126.)

The authority of companies to take lands depends upon the provisions of the particular act of parliament. Where a company proceed to take lands which they are not authorized to take, their proceedings before a jury will be a nullity. A jury can only assess the value of property which the act authorized the company to take ; consequently if the company are not authorized to take the particular portion of land in question, they never can, by means of any assessment by a jury or tender of payment, acquire the inheritance of such land. (*Mouchet v. Great Western Railw. Co.*, 1 Railw. C. 575.) Where the company have the power of making a railway, or not making a railway, through a *particular parish*, and they do *not* make it through such parish, then they will not be authorized to purchase any land in that particular parish. (*Tomlinson v. Manchester and Birmingham Railw. Co.*, 2 Railw. C. 122.)

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The general principles applicable to the construction of acts of parliament, authorizing the making public works, have been considered in a preceding note. See *ante*, pp. 64—66.

Companies for executing railways and many similar public works cannot be carried into execution without obtaining the authority of parliament, and before such authority has been obtained, they are now prohibited from purchasing, contracting for, or holding lands. (7 & 8 Vict. c. 110, ss. 23. 24.)

*The property to be taken by a company is invariably specified in the schedule to the special act, and a time is limited within which the compulsory powers are to be exercised. If [*234] no such period be prescribed by the special act, then such power is not to be exercised after the expiration of three years from the passing of such act. (8 & 9 Vict. c. 18, s. 122.) By 5 & 6 Vict. c. 55, s. 15, (*ante*, pp. 31, 32,) additional land may be taken after the expiration of the prescribed period, for the purpose of giving increased width to the embankments and inclination to the slopes of railways, or for making approaches to bridges or archways, or doing certain works therein mentioned for the repair or prevention of accidents. On the certificate of the Board of Trade that the public safe-

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ty requires additional land for such purposes, the compulsory powers of purchasing and taking the lands mentioned in such certificate are to revive for such further period as shall be therein mentioned. (1)

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(1) A railroad company though it derives its powers from the State, does not act in behalf of the State, or as its instrument or agent, but under a special grant acquired for a valuable consideration for the promotion of its own direct and private advantage. (*The New York and New Haven Railw. Co*, 21 Connecticut 294)

Purchase of
lands for ex-
traordinary
purposes.

The special act frequently empowers the undertaking to purchase lands, not exceeding a prescribed number of acres, for extraordinary purposes. When the special act contains such power, the parties enabled to convey may sell and convey the lands so authorized to be purchased for extraordinary purposes. (8 & 9 Vict. c. 18, s. 12.) The railway company in addition to the lands authorized to be compulsory taken under the 8 & 9 Vict. cc. 18, 20, and the special act, may purchase any land adjoining or near the railway, not exceeding the prescribed number of acres, for extraordinary purposes viz. for making and providing additional stations, yards, wharfs and places for the accommodation of passengers, and for receiving, depositing, and loading or unloading goods or cattle to be conveyed upon the railway, and for the erection of weighing-machines, toll-houses, offices, ware-houses and other buildings and conveniences—for making convenient roads or ways to the railway, or any other purpose which may be requisite or convenient for the formation or use of the railway. (8 & 9 Vict. c. 20, s. 45. *Cotter v. Midland Railw. Co.*, 2 Phill. C. 469; 5 Railw. C. 187.)

Protection of
certain kinds
of property
from injury.

The special act usually contains a provision to this effect, that the company shall not take or injure any property of the following kinds, except such as shall be specified in the schedule to the special act, without the consent in writing of the owners and occupiers thereof, unless the omission in such schedule be certified by two justices to have proceeded from mistake, (that is to say,) any house or building erected on or before the 30th day of November preceeding the passing

of the special act, or any ground on or before that day inclosed or set apart and used as a garden, orchard, nursery ground, yard, paddock, plantation, planted walk or avenue to a house. A clause to this effect was originally inserted in the 8 & 9 Vict. c. 18, after the 92d section, but was struck out by the committee. If any omission, mis-statement or erroneous description shall have been made of any lands, or of the owners, lessees or occupiers of any lands described in the plans or books of reference, or in the schedule to the special act on application of the company, after two days' notice to the landowners to be affected, two justices may certify that such omission proceeded from mistake. (8 & 9 Vict. c. 20, s. 7.) In *Taylor v. Clemson*, (3 Railw. C. 65, 90; 2 Q. B. R. 978; 2 Gale & D. 346; 8 Jur. 833; 11 Cl. & F. 610,) an objection was taken to the certificate of two justices, under a similar clause, on the ground that it certified as to the omission of a house only, omitting the yard and garden, which were also omitted in the schedule to the act; but it was held that the yard and garden might pass under the word house, as there was an express finding by the jury, that at the time of the passing of the act, and thence hitherto the yard and garden were parcel of and included in the description of the house in the schedule to the certificate, and occupied therewith as such parcel thereof. In point of law, by the grant of a messuage or *house*, the garden, orchard and curtilage do pass. (Co. Litt. 5 b; see *post*, p. 236.)

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The 94th sec. of the Manchester and Leeds Railway Act empowers the company to enter into and upon the lands of any person or corporation whatsoever, according to the provisions and restrictions of the act, and in or upon such lands or in or upon lands adjoining thereto, to bore, dig, cut, embank, and remove and use any earth, stone, gravel or sand, or any materials or things which may be dug or obtained therein, or otherwise in the execution of the powers of the act, and which may be proper or necessary for making, maintaining, repairing, or using the railway, and other works by the act authorized, or which may obstruct the making, maintaining, or using the same;

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and it empowers the company, according to the provisions and restrictions of the act, to make or construct inclined or other planes, tunnels, embankments, bridges, &c. The 96th section enacts, that the lands to be taken for the line of the railway shall not exceed twenty-two yards in breadth, except where a greater width may be required for either embankments or cuttings. It seems that the company have not, under these clauses, power by compulsory process to purchase land for the purpose of making an embankment upon other and lower land on a different part of the line. (*Webb and others v. Manchester and Leeds Railw. Co.*, 1 Railw. C. 576; 4 My. & Cr. 116.) If the company proceed to take lands in a way not strictly conformable with what the act requires, the court will interfere by injunction to prevent them so dealing with the property. (*Stone v. Commercial Railw. Co.*, 4 My. & C. 122; 1 Railw. C. 375; see note on Injunctions, *post*.)

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A clause in a railway act enacted, "that it shall not be lawful for the company to make or establish any *public* station, yards, wharfs, waiting, loading or unloading places, warehouses or other buildings and conveniences for the depositing, receiving, loading or keeping any passengers or *cattle, or any goods, articles, matters or things upon the estate of R. G. his heirs or assigns, or within fifty yards of the boundaries thereof without the previous consent in writing of the said R. G. his heirs or assigns, for that purpose had and obtained." R. G. filed a bill to restrain the company from using an engine-house and other buildings erected by them within the prescribed limits. It was held, on demurrer, that the word "*public*" did not necessarily override the whole section; and that if it did, every thing connected with the railway must be considered as for the public use. The injunction in this case was granted, but with liberty to use the erection as theretofore, upon their undertaking to erect no more, and to apply for a rehearing or to prosecute an appeal to the House of Lords. (*Gordon v. Cheltenham and Great Western Railw Co.*, 2 Railw. C. 800, 872; 5 Beav. 229.)

By an act for making and maintaining a railway to connect

the Great North of England, Clarence and Hartlepool Railway, in the county of Durham, it was provided by sect. 4, "that nothing in the act contained should authorize the company to enter into or upon, &c. the lands, &c., of any corporation or person whomsoever, without the consent in writing of the owner or occupier thereof, or other party entitled to give such consent, first had and obtained." Sect. 43, provided "that in every such case in which the said railway shall cross any other railway, the communication between the railway by the act authorized to be constructed and such other railway, and all openings, &c., or bridges or tunnels over or under the railway, so to be crossed, for the purpose of such crossing, should if the company and the parties to whom such other railway should belong did not agree about the same, be made in such manner as should be directed by two engineers, or other competent persons, (one to be chosen by each party,) and an umpire, and the decision of such engineers or umpire as the case might be, should be binding on all parties, provided that if the party to whom the railway to be crossed should belong should refuse, or for twenty-one days after notice neglect to appoint an engineer on his behalf, the engineer for the time being of the said company (requiring to cross the other railway) should have full power to make such communications, openings, bridges &c. as he should think proper, provided also that the last mentioned company should defray all the expenses of the reference and of such communications, &c. and of keeping them in repair, and should also make satisfaction for any temporary or permanent or recurring injury, which might be occasioned to such railway so to be crossed, &c. and that the said company should have full power at all times to cross every such railway by means of such communications with any engines and carriages without being liable to the payment of any toll for crossing: it was held, that the consent in writing of the owner of any lands, &c. which was required by sect. 4 to be obtained before any entry upon them, extended *as well to the owner of lands covered by a railway as to the owners of any other lands; and that such consent by the owners of lands covered by a railway

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8 & 9 VICT. c. 18. was not limited or qualified by the provisions of section 43.
 Sect. 16. (*Clarence Railw. Co. v. Great North of England, Clarence and Hartlepool Junction Railw. Co.*, Law J. 1843, Q. B. 145; 3 G. & D. 389; 4 Q. B. R. 46; 13 Mees. & W. 706; [337] *S. C.* in Chancery, 2 Railw. C. 763; 3 Railw. C. 426.)

Parties not to
 be required
 to sell part
 of a house.

No party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house, or other building or manufactory, if such party be willing and able to sell and convey the whole thereof. (See 8 & 9 Vict. c. 18, s. 92, and note, *post*.)

By a railway act it was enacted, that if the railway company should be desirous of purchasing part of any house, garden, *yard*, warehouse, building or manufactory, and the owner should signify his inclination to sell the whole of such house, garden, *yard* &c; he should not be compelled to sell to the company part only or less than the whole of such house, garden, *yard*, &c. It was held that a yard for bonding foreign timber, in which there were a shed and two buildings containing saw-pits, was not a *yard*, within the meaning of the enactment. *Shadwell*, V. C., thought that the true way of construing the act was to look at the different sections in which the word "yard" either singly or with any thing adjoining to it in the way of adverbial substantive, or any thing else which may give it a particular qualification, is used, and then to consider whether it is not evident on the face of the act, that the word must have different significations in the different sections. (*Stone v. Commercial Railw. Co.*, 9 Sim. 621.) *Shadwell*, V. C., observed, "These (railway) acts of parliament are made by persons conversant with the law, and it is not wholly immaterial to consider what is the notion attached by law to a house." (See Co. Litt. 5 b; *Taylor v. Clemson*, ante p. 234.) In the particular case he thought that when the legislature used the word "house" they adverted to the general sense in which it is used; but yet, for the purpose of excluding any doubt, they also added the words "garden and yard," but when they added these subsequent words, he thought they did not mean a thing which in any sense is

a yard, but that which in one precise sense is a yard, namely, 8 & 9 Vict.
c. 18
Sect. 16. which is connected with a messuage and is capable of passing by the description of a messuage. (*Stone v. Commercial Railw. Co.*, 1 Railw. C. 396, 397; 9 Sim. 621.)

The Blackwall Railway Act, 6 & 7 Will. 4, c. cxxiii., enabled the company to make the railway in a certain line, and to purchase lands, and required them to make a compensation for damages; the purchase money and compensation to be assessed, in case of disagreement, by a jury, who should be summoned on the company's warrant to the sheriff. By sect. 50, if any person should be applied to by the company to sell part of a house, &c. in his actual occupation, and *should offer to treat with them for the whole, and they should refuse, such person was not to be compellable to sell less than the whole. By sect. 51, if any dwelling-house, &c., situate within fifty feet of the railway, should be deteriorated by it, and the owner should require the company to purchase the same, they were required to treat for the purchase, compensation, &c.; the amount in case of disagreement to be settled by a jury as in other cases: proviso, *that in no case should the company be compellable to purchase any portion of any dwelling-house, &c., which portion was situate at a greater distance than fifty feet from the railway*: further proviso that the company, *whenever called upon to take part of such dwelling-house &c. might, at their option, take the whole*, subject to payment of compensation &c. Stat. 2 & 3 Vict. c. xcv., provided, that if the company should not, on request, issue their warrant for a jury within twenty-one days, the party claiming compensation might send a precept in writing to the sheriff, who should thereupon summon a jury, &c. The company were required to purchase a public-house, forty-four feet in depth, the greater part of which was within fifty feet of the railway, but a portion comprising the bar, and varying in depth from thirteen to sixteen feet, was more than fifty feet from the railway; and it was alleged that the premises were deteriorated by the railway, and that if the former portion only were purchased,

Obligation to purchase whole of house within a given distance of the railway.

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8 & 9 VICT. the residue would be useless to the owner: it was held, that
 c. 18. compensation was claimable for the whole. (*Walker v.*
 Sect. 16. *London and Blackwall Railw. Co.*, 3 Q. B. R. 744; Law J. 1843, Q. B. 18; *S. C. nom. Reg. v. London and Blackwall Railw. Co.*, 3 G. & D. 549.)

Under the same acts, the owner of a dwelling-house, the greater part of which was within fifty feet of the railway, and the rest beyond it, called upon the company to purchase the whole, in a notice which stated that the premises were within fifty feet of the railway and were deteriorated by it, and claimed compensation. This notice being disregarded, he sent another notice, requiring them to summon a jury, which being also disregarded, he sent a precept to the sheriff, stating that the premises were within fifty feet of the railway, and deteriorated by it, reciting the above notices and requiring the sheriff to summon a jury, to inquire whether the property was deteriorated by the railway, and whether he was entitled under the statutes to have it purchased and compensation made by the company, and if the jury should so find, to assess compensation. On the inquiry, it appearing in evidence that part of the premises was not within the fifty feet, the sheriff on that ground refused to hear further evidence, or to proceed with the inquiry, and directed the jury to find that the claimant was not entitled to have his property purchased by the company. Upon motion for a mandamus to the sheriff to execute the precept, it was held that a house so circumstanced was properly called a house within fifty feet of the railway, and *that the company were bound to purchase the whole of it; and that the precept, although improperly raising, as a question for a jury, the fact of the house being within the prescribed distance, without which they had no jurisdiction to inquire, was sufficient and the court issued a mandamus. (*Ibid. Reg. v. Sheriff of Middlesex*, 3 Railw. C. 396.)

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By the Greenwich Railway Act, 3 & 4 Will. 4, c. xlvi., the company were empowered to take lands, &c., making recompence, &c.; and it was enacted, (sect. 45,) that if any

person were applied to by them to sell any part of any house warehouse, &c. in actual occupation, and should require the company to treat for the whole, and if they should not be willing to purchase *the whole of such house, warehouse, &c.* such person should not be obliged to sell them a part only. Sect. 46 provided in like manner as to particular properties therein named, enacting that, if the company would not purchase the whole, the owner or lessee should not be obliged to sell less than *the whole of such property*. Sect. 47, enacted that, if the owner, &c. of any house, manufactory, ground or building, *which should be situate within fifty feet of the railway*, should give notice to the company to purchase his interest in such houses, manufactories, ground or building, the company should treat for the purchase of his interest in the *houses, manufactories, ground and buildings*, mentioned in such notice, and in case they should not agree, the compensation should be settled by a jury, whom the company might cause to be summoned. There were clauses provided for the recovery of compensation by owners of buildings, lands, &c. for damage generally occasioned by the execution of that act. S. & Co. were lessees of premises, on which were a vinegar manufactory, warehouse, &c. a principal dwelling-house and garden, and five smaller dwelling-houses, which premises were so situated, that a straight line drawn parallel to the railway at a distance of fifty feet would divide the principal dwelling-house and the garden, but would pass between the rest of the premises and the railway. S. & Co. required the company to purchase their interest in the whole premises. The company refused, but offered to purchase the principal dwelling-house and garden. It was held that the act did not oblige them to purchase more; and a rule for a mandamus to the company to cause compensation to be assessed for the whole was discharged. (*Reg v. London and Greenwich Railw. Co.*, 3 Q. B. R. 166; 3 Railw. C. 138; 6 Jur. 892.)

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The 6th section of the Railway Clauses Consolidation Act provides that the construction of the railway shall be subject

For what
compensation may be
claimed.

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to the provisions contained in that act and in this act, and that the company shall make the owners and occupiers of, and all other parties interested in, any lands taken or used for the purpose of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties by reason of the exercise, *as regards such lands, of the powers of the Railways Clauses Consolidation Act, or the special act, or any act incorporated therewith, vested in the company; and, except where otherwise provided by either of those acts, the amount of such compensation shall be ascertained and determined in the manner provided by this act for determining questions of compensation with regard to lands purchased or taken under the provisions thereof; and all the provisions of this act shall be applicable to determining the amount of any such compensation, and to enforcing the payment or other satisfaction thereof. (8 & 9 Vict. c. 20, s. 6.) Subject to the provisions of the special act, and any act incorporated therewith, the railway company in constructing the railway, may execute the several accommodation works therein mentioned; but in the exercise of such powers shall do "as little damage as can be, and shall make full satisfaction to all parties interested for all damage by them sustained by reason of the exercise of such powers." (8 & 9 Vict. c. 20, s. 16.) The company shall make good all damage done to the property of the water or gas company or society by the disturbance thereof, and shall make full compensation to all parties for any loss or damage which they may sustain by reason of any interference with the mains, pipes or works of such water or gas company or society, or with the private service pipes of any person supplied by them with water. (8 & 9 Vict. c. 20, s. 21.)

The discretionary power of making works given to a railway company must be exercised reasonably and *bona fide* by doing such works in such a manner as reasonable, careful and skilful men would judge expedient and fit. (*London*

and Birmingham Railw. Co. v. Grand Junction Canal 8 & 9 VICT.
Co., 2 Railw. C. 224; *Priestly v. Manchester and Leeds* c. 18
Railw. Co., 2 Railw. C. 154.) And if such companies in carrying on their works do more damage than the necessity of the case requires, the Court of Chancery will restrain them by injunction. (*Manser v. Eastern Counties Railw. Co.*, 2 Railw. C. 391.) See note on Injunctions. Sec 16.

The owners or occupiers of lands taken by a railway company under the powers of the Railways Clauses Act, for making spoil banks or for obtaining materials therefrom, may, before they have accepted compensation for temporary occupation, by notice require the railway company to purchase such lands, or the estate and interest therein capable of being sold and conveyed by the parties serving such notice, and thereupon the company will be bound to purchase. (8 & 9 Vict. c. 20, s. 42.) Owners of lands may compel company to purchase lands temporarily occupied.

Under certain regulations and restrictions the railway company may take temporary possession of lands, paying to the occupier the value of any crop or dressing thereon, and full compensation for any other damage of a temporary nature, and paying a quarterly rent to the occupier or owner of the lands, to be settled by two justices in case the parties differ, within six months after the occupation of the *company shall have ceased, and not later than six months after the expiration of the term limited for the completion of the railway, the company shall pay to the owner or occupier of such lands or deposit in the Bank, "compensation for all permanent or other loss, damage or injury that may have been sustained by them, by reason of the exercise, as regards the lands, of the powers by the Railways Clauses Act or special act granted, including the full value of all clay, stone, gravel, sand and other things taken from such lands." (8 & 9 Vict. c. 20, s. 43.) The amount and application of compensation is to be determined in the manner provided by this act for determining the amount and application of the compensation to be paid for lands taken under the provisions thereof. (8 & 9 Vict. c. 20, s. 44.) Compensation for temporary occupation.

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How compensation is to be estimated.

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The jury, justices, arbitrators, or surveyors, in estimating the compensation to be paid by the promoters of the undertaking, are to regard not only the value of the land to be purchased or taken by such promoters, but also the damage, if any, to be sustained by the owner of the lands by reason of the *severing* of the lands taken from the other lands of such owner, or otherwise *injuriously affecting* such other lands by the exercise of the powers of the acts. (8 & 9 Vict. c. 18, ss. 49, 63.) Where part only of lands held under a lease are taken, the rent is to be apportioned, and the tenant will be entitled to receive compensation for the damage done to him in his tenancy, by reason of the *severance* of the lands required from those not required, or *otherwise* by reason of the execution of the works. (8 & 9 Vict. c. 18, ss. 119, 120.) Any person having no greater interest than as tenant for a year, or from year to year, required to give up possession of lands in his possession before the expiration of his interest, is to be compensated for the value of his interest, and for any just allowance which ought to be made by an incoming tenant, and for any loss he may sustain; or if part only of such lands be required, compensation for the damage done to him in his tenancy by severing the lands, or otherwise injuriously affecting the same. The amount of such last mentioned compensation is to be settled by two justices if the party differ. (8 & 9 Vict. c. 18, s. 121.)

The promoters of the undertaking are empowered to purchase lands, the purchase whereof may have been omitted by mistake, on paying compensation for such lands and for the mesne profits. In estimating such compensation, the value of such lands and mesne profits is to be assessed according to the value at the time such lands were entered upon, and as though the work had not been constructed. (8 & 9 Vict. c. 18, ss. 124, 125.)

Entry upon
lands.

By an agreement between the plaintiffs and the agent of a railway company, the former agreed to sell to the company a certain portion of a field for the price of 229*l.* in the whole being 120*l.* for the land and 109*l.* for compensation for

damage by severance to the remaining portion. The agreement contained a stipulation, that in case additional land *shall be wanted by the company, the same shall be taken and paid for after the same rate per acre. The company subsequently took possession of a second portion of the field for the purpose authorized by their act, and entered upon the same without having previously paid the purchase money for the second portion after the rate specified in the agreement, and without having previously agreed upon or ascertained by reference to a jury the damage occasioned by the severance of the second portion from the remaining portion of the field. A bill having been filed for an injunction, it was held by Lord *Cottenham*, C., that the agreement only provided for the amount to be paid to the plaintiffs for the value of the second portion of the field, and that neither by intention nor legal construction did such value include the amount of *damage by severance* to the remaining portion of the field, which amount was either to be agreed upon by the parties or ascertained by a jury: that until such amount was agreed upon or ascertained, the company were not entitled to enter upon the second portion. Upon the undertaking of the company to pay the amount of damage to the land by the severance, and to take proper proceedings, if necessary, for ascertaining the amount of such damage, the injunction was withheld. (*Jones v. Great Western Railw. Co.*, 1 Railw. C. 684.)

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The 39th section of the Great Western Railway Act provides for the payment into the Court of Exchequer of the money agreed or awarded to be paid for the purchase of lands to which a title shall not be made out to the satisfaction of the company. The 42d section provides, that upon payment, tender or deposit of such purchase money, the company shall be entitled to enter upon such lands. The company entered into an agreement with a landowner for the purchase of lands on the line of the railway, and before acceptance of title, or payment, tender or deposit of the pur-

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chase money, entered upon the land. It was held by *Shadwell*, V. C., that such entry was illegal. But it was held by *Shadwell*, V. C., and Lord *Cottenham*, C. affirming his honor's decision, that this was not a case within the act; that on payment of the purchase money into the court in which the bill was filed, the company were entitled to enter; and that an injunction which had been obtained *ex parte* should thereupon be dissolved. (*Hyde v. Great Western Railw. Co.*, 1 Railw. C. 277.)

Purchase of
land.

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The plaintiff, the rector of Stoke-upon-Trent, was empowered by act of parliament to sell the glebe lands or to lay out the same for building purposes. The provisional committee of a railway company, who were soliciting an act of incorporation, by an agreement in writing contracted with the plaintiff to purchase a portion of the glebe, which had been laid out for building, and the plaintiff, as part of the terms of the agreement, withdrew his intended opposition and assented to the railway bill, which passed into an act. At the time of entering into the agreement, all the lands, except one field, which was let to a tenant, were *lying waste; and after the agreement, an agent of the company, conceiving that they had purchased and paid for the land, agreed to let the unoccupied portion from week to week, and received a small sum from the tenants of that portion of the land; but discovering his mistake on the remonstrance of the plaintiff, he put an end to the tenancy, and tendered to the plaintiff the rent received. It was not determined whether the railway would pass through the glebe land. On a motion that the company might be ordered to pay into the court the amount of the purchase money for the land, it was held, that, although where a purchaser has taken and continues possession, he cannot retain it without paying the purchase money into court, yet that in the present case the agent of the company having entered by mistake and having quitted possession, the rule did not apply. It is questionable whether a court of equity will

decree the specific performance of a contract by a railway company to purchase land, if the company should afterwards so exercise their powers as to disable themselves from taking the same lands, and whether the vendor has any other remedy in such case. (*Tomlinson v. Manchester and Birmingham Railw. Co.*, 2 Railw. C. 104.)

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Under a compensation clause in favor of persons interested in any lands which shall or may be taken, used, damaged, or *injuriously affected* by the execution of the act, a party was held entitled to compensation for an injury to his land occasioned by lowering a road on which the claimant's land abutted. (See s. 68, *post*, for the decisions upon this act as to *lands injuriously affected*.)

Compensa-
tion for
lands inju-
riously affect-
ed by rail-
way act.

By a railway act (6 & 7 Will. 4, c. cvi.) a company were empowered (s. 9), (*inter alia*) "to raise or lower certain roads or ways, in order the more conveniently to carry the same over or under or by the side of the railway, doing as little damage as may be in the execution of the powers hereby granted, and making full satisfaction, *in manner hereinafter mentioned*, to all persons interested in any lands which shall be *taken, used, or injured*, for all damages by them sustained in or by reason of the execution of all or any of the powers hereby granted." Sect. 28 provides, "that the owners or occupiers of any lands, *through, over, or upon which* the railway is intended to be made, may agree to accept satisfaction for the value of such lands, and also compensation for any damage by them sustained by reason of the taking thereof, or by reason of any of the works by this act authorized, or of the execution of the powers hereby granted, in such gross sums, &c.;" and for any damage, loss or inconvenience sustained by such persons severing or dividing of such lands. And by sect. 29, for settling all differences between the company and the owners and occupiers of lands "which shall or may be taken, used, damaged or *injuriously affected* by the execution of any of the powers of the act," it was provided that "*if any of the parties en-*

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titled to receive such purchase money, satisfaction, recompence, or compensation as aforesaid, shall refuse to accept "such purchase money, &c., as is offered by the company, or in any other case where agreement for compensation, for damages incurred in the execution of this act, or for the purchase of lands, cannot be made," a jury is to be summoned to assess the purchase money; "and also the sum of money to be paid by way of satisfaction, recompence and compensation, either for the damages which shall before that time have been done or sustained as aforesaid, or for or by reason of the severing or dividing the same from other lands." The company had lowered a road in front of a piece of land, and thereby injured its value by impeding the access to it and causing the necessity of additional fences, &c., but they had not actually touched any part of the land. It was held, that the words of the 29th section do not necessarily refer to the persons mentioned in the 28th section alone, but may apply to and include cases mentioned in the 9th section, and that the company were bound to issue their warrant to summon a jury to make compensation for the damage to the land in question. (*Reg. v. Eastern Counties Railw. Co.*, 2 Railw. C. 736; 2 Q. B. R. 317; 1 Gale & D. 589; Law. J. 1842, Q. B. 66; 6 Jur. 557; see *Rex v. Nottingham Old Water Works Co.*, 6 Ad. & E. 255.) In this case it was argued, that if such a claim as this was sufficient, the proprietor of every house, however distant from the railway, would be entitled to claim compensation for the most trifling annoyance or injury. Upon which *Denman* C. J. observed, "If extreme cases should arise, we should know how to deal with them; but in the present instance, the alleged injury is to land adjoining a road, which has been lowered under the provisions of the act, and is therefore land "*injuriously affected*" by an act expressly within the powers conferred on the company." (*Ib.*)

Upon the construction of an act it was held, that a railway company could not be permitted injuriously to affect,

lands without a previous tender of payment for damages. The 12th section of the North Midland Railway Act empowered the company to take land for the purposes of the act, and to enter upon lands adjoining to the railway, and to dig and use materials obtained therein, they, the company, making full satisfaction for all lands to be so taken, used, or injured, and for all damages by reason of the execution of all or any of the powers thereby granted. The 31st section enabled proprietors, occupiers or persons interested in such lands, to receive payment for the value thereof, and also compensation for any damage by the severance of such lands; and for any damage, loss or inconvenience sustained by the taking thereof. The 32d section, for settling all differences to arise between the company and the proprietors of, or persons interested in, lands, which should be taken, damaged or injuriously affected, provided for the empannelling of juries to assess the amount of purchase monies and compensation. The 53l section enabled the company, upon payment, tender or deposit of the sums of money agreed upon or awarded for the purchase of any lands, immediately *to enter upon such lands, provided that before such payment, &c. it should not be lawful for the company to enter upon such lands for any of the purposes of the act. The 54th section provided, that before taking temporary possession of any lands, the company should agree with the owners or occupiers for an annual rent in respect thereof; and if required, should give security for payment of compensation for any permanent injury which might be sustained. The company having entered upon lands of the plaintiff for the purpose of taking the sub-soil to form an embankment, he filed his bill, praying that they might be restrained from so doing until they should have agreed with the plaintiff for a fixed annual rent during their occupation of the land, and giving security for compensation: it was held by *Shadwell* V. C., that the acts complained of were not within the 54th section, but were by the proviso of the 53d section, brought within the condition of the 12th section, and extended not

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8 & 9 VICT. only to lands to be purchased, but to lands to be damaged or
 c. 18. injuriously affected, and that the company could not be per-
 Sect. 16. mitted injuriously to affect lands without a previous tender
 of payment for damages. (*Innocent v. North Midland
 Railw. Co.*, 1 Railw. C. 242.)

Injury to an
 easement

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Where an act of parliament gave certain commissioners power to purchase lands, &c. and directed them to make compensation to persons interested therein for all damage sustained, it was held that a party entitled to an easement over lands so purchased by them could not maintain trespass for acts done upon such lands to the prejudice of his easement, but as soon as damage was actually sustained he ought to have claimed compensation under the act. (*Thicknesse v. Lancaster Canal Co.*, 4 Mec. & W. 472.) In this case *Parke, B.*, observed, "I think the sections in the act of parliament which enabled the company to treat with persons interested in the land do not apply to persons who have a mere *easement*, or right of passage over the land. All the company want to purchase is, the lands themselves, and they must treat with those who have an interest in them, either as tenants in fee, for life, or for years, in severalty or in common. The company are also bound to make compensation to any person interested in lands, or having a right of way or easement into or over lands, for any damage he may sustain in consequence of the works performed by the company under or by virtue of the powers of the act of parliament; and in this case, if the plaintiff has sustained any real injury by the division of his land by the railroad, and if they do not put him in the same situation as he was before, by putting a bridge where a railway is he will be entitled to recover full compensation from the company. (*Thicknesse v. Lancaster Canal Co.*, 4 Mees. & W. 493.)

Under a railway act, which gave power to divert rivers water-courses, &c., a company had raised the level of a brook, into which the sough of a coal mine had been accustomed to empty itself, and thereby caused the water of the brook to

flow into the sough, and inundate and stop the coal works; upon the owner of them applying for a *mandamus* for a jury to *ascertain* and compensate him for the injury done to his works by such diversion of the brook, which was opposed by the company on the ground that, on the claimant's remonstrance, they had restored the brook to its former level, and that no damage had been done by the alteration, such stoppages having been frequently caused by floods before; it was held that it was a question for a jury to ascertain whether any damage had been done to the claimant, and that his alleging that he was injured by the diverting (i. e. altering the level) of the brook was sufficient to induce the court to grant a *mandamus*. (*Reg. v. North Midland Railw. Co.*, 2 Railw. C. 1.) An action on the case will lie for special damage occasioned to a party having a right of way over any road interfered with, if another sufficient road has not been made. (8 & 9 Vict. c. 20, s. 55.)

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In a case not reported, which occurred in 1837, the Exeter Improvement Commissioners, in cutting down a road, left the house, at the original level, so that they were obliged to make steps to them. The commissioners returned that they had only interfered with the road way; but the court held that the injury came within the spirit and words of the act, which mentioned "any other matter or thing done." (2 Railw. Ca. 748, 749; see *Reg. v. Manchester and Leeds Railw. Co.*, 1 Railw. C. 523.)

The Hull and Selby railway act provided that where any carriage road, "quay, wharf, &c." should be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impassable or inconvenient for passengers, &c. or for the transporting, conveying, landing, shipping, or disposing of any goods, "the company should, before such cutting or other work should be done, cause another good and sufficient road. quay, wharf, &c. to be set out and made instead thereof," &c. The plaintiff had a wharf on the river Humber, between which and the low water mark the defendants constructed their railway in the line pre-

Intercepting
a wharf.

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c. 18.

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scribed by their act of parliament, thereby rendering the wharf inconvenient and dangerous. It was held that the plaintiff's wharf was thereby injured within the meaning of the section, which was not confined to an injury done bodily to the wharf itself; that he was entitled to have a new wharf constructed for him by the defendants, and was not bound to apply for compensation under another section, which empowered a sheriff's jury to assess the sum payable for any future, temporary, or perpetual, or recurring damages, done or sustained by reason of taking land for the purposes of the act. *Bell v. Hull and Shelby Railw. Co.* 6 Mec. & W. 699; see *S. C.* on proceedings in Chancery, 1 Railw. C. 616.)

The tenant of a public house, whose custom has been affected by the cutting off of a communication by reason of the works of a company, was held not to be entitled to compensation where no part of the premises had been taken or touched by the company.

Intercepting
thorough-
fares.

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*The London Dock Company were empowered to take houses, &c., making compensation for "goodwill, improvements, or for any injury to be sustained by any persons interested in houses so taken." They were also authorized to level the ground and to stop up all ways, and to provide such sluices, bridges, roads, &c. communicating with the docks and works, as they should think necessary. It was then enacted, that if any person having an estate or interest not less than a tenancy from year to year in any house, &c. should be injured in his said "estate or interest by the making of any such cut, sluice, bridge, road or other work, such person should be compensated. The company pulled down houses, and made a cut which intercepted several thoroughfares, and obliged those who had formerly used them to take circuitous routes. The tenants of a neighboring public house demanded compensation, inasmuch as the pulling down of the premises, and the obstruction of the access, had diminished the resort of persons to the house; and also as the occupier of the house were cut off from thoroughfares to the house formerly

used, and thereby the value of the premises to sell or let ^{8 & 9 Vict.} as a public house or shop, but not as a private residence, were ^{c. 18.} lessened. But the claimants were considered as not entitled to ^{Sect. 16} compensation, as their case was not brought within the section. (*Rex v. London Dock Co.*, 5 Ad. & E. 163.) For the act in its full extent was authorized; there was no public nuisance and, if the injury by loss of trade had been put out of the question, there was no private inconvenience sustained beyond the public nuisance. It was distinctly stated that it was only "to sell or to let as a public house or shop," in other words, in respect of its goodwill, that the pecuniary value of the house was diminished. (*Per Denman, C. J., Rex v. London Dock Co.*, 5 Ad. & E. 178; 6 Nev. & M. 390; 2 Har. & W. 267.)

The tenant is not entitled to compensation for improvements which by the terms of his tenancy he was to give up to his landlord. By the 11 Geo. 4, c. xx., the Hungerford Market Company are empowered to make compulsory purchases of lands for the use of the market; and by sect. 19 all tenants from year to year, or at will, occupiers of any part of the estate called the Hungerford House, &c., or therewith contracted to be purchased by the company, who shall or may sustain or be put unto any loss, damage or injury in respect of any interest whatsoever, for goodwill, improvements, tenants' fixtures, or otherwise, which they now enjoy by reason of the passing of the act, shall receive compensation from the company. While the company were treating for the purchase of certain premises under the act, a person entered into an agreement to rent them for one year, and that if, with the owner's consent, he should hold beyond the year, he should quit, or be at liberty to quit, at any quarter day, on receiving or giving three months' notice; that he would not underlet or give up possession to any one, make any alteration without a written consent of his landlord, *would keep all the glass entire, and so leave the same, together with all articles mentioned in a schedule, and all improvements or additions which he should make during his occupation, for the benefit of

Where tenant not entitled to compensation.

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8 & 9 VICT. his landlord. The tenant occupied, with the consent of his
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[248] landlord, for several years, while the above negotiations were proceeding. He afterwards received due notice to quit, and the purchase by the company was completed. It was held, that he was not entitled to compensation from the company in respect of the improvements made by him during his occupation. (*Reg. v. Hungerford Market Co.*, 1 Per. & D. 492; 9 Ad. & E. 463.)

A landlord entered into some arrangement with his tenant for a lease for eight years. Afterwards a railway company being in want of part of the farm, agreed with the landlord for its purchase. Subsequently to this, by some mistake, the landlord on the same day granted a lease of the whole farm to the tenant, and conveyed a part of it to the company. A question also arose under the agreement, whether the landlord or the company was to make compensation to the tenant. The company took possession, and the tenant brought ejectment. It was held under these circumstances, that the company could maintain a suit to stay the ejectment and to ascertain their rights, and an inquiry was directed whether the tenant had a valid agreement for a lease as alleged by him. (*Norwich Railw. Co. v. Wodehouse*, 11 Beav. 382; 13 Jur. 435.)

Goodwill.

In a case arising under the Hungerford Market act, a tenant from year to year was ejected by the company, but received a regular half-year's notice to quit. It appeared that she had been many years in possession, and that the tenancy was not likely to have been determined if the act had not passed. She was held entitled to compensation for the whole marketable interest which she had in the premises when the act passed, and that the good-will, though of premises on so uncertain a tenure was protected by the act as an interest which would practically have been valuable as between the tenant and a purchaser, though it was not a legal interest as against the landlord. But it was otherwise where the tenancy was from year to year, determinable at three months' notice, ending with the year and with a stipulation against underletting without leave. (*Ex parte Farlow and Ex parte Wright in*

re Hungerford Market Co., 2 B. and Ad. 341, 348.) The same statute provided compensation for persons "damaged or injured by or in the taking down of any of the messuages or buildings to be taken down for the purpose of or otherwise in the execution of the act." The company purchased a house not mentioned in the schedule, and in pulling it down injured the adjoining house. It was held, that the tenant of the adjoining house was not entitled to compensation by the process provided for by the act. (*Rex v. Hungerford Market Co.*, 3 Nev. & M. 622; 1 Ad. & E.; see *post*, s. 121, note.)

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The plaintiff was lessee of premises, held of the Croydon *Canal Company for an unexpired term of nineteen years, subject to be determined on his receiving from the lessors six months' notice, and two years' reserved rent. By an agree- [*249]
ment between the promoters of the proposed railway company of the first part; the canal company of the second part; the plaintiff and others, as lessees of the canal company, of the third part; and the plaintiff and others, as owners of the barges on the canal, of the fourth part; it was agreed that in consideration of the parties of the second, third and fourth parts withholding their opposition to a bill in parliament, the railway company should, in case they purchased from the canal company any hereditaments then under lease for any unexpired term of years, purchase the same without prejudice to any such lease, and the price should be ascertained accordingly; that in case any of the parties thereto of the third part should be applied to by the railway company to treat for any part of the premises then held under leases, or if any of the said parties should give notice to the railway company of their desire to sell the premises held as aforesaid, such parties should accept and be entitled to receive compensation for the nature of their respective leasehold interests, and for damages sustained by them in the execution of the act. The plaintiff and the other parties withheld their opposition to the bill, which passed into an act. The railway company purchased of the canal company the whole of their canal and premises. The plaintiff gave a notice to the rail-

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way company, requiring them to purchase his leasehold interest, and claiming compensation for damages. The railway company, tendering to the plaintiff two years' reserved rent, gave a counter notice to determine the tenancy at the end of six months; at the expiration of which they brought an ejectment. The plaintiff obtained a common injunction, on default of an answer, to restrain the company from proceeding in the ejectment. It was held by *Shadwell*, V. C., that the railway company had power to determine the lease in such manner, and that the plaintiff having had possession of the premises during the six months, in respect of which only he would have been entitled to compensation, the injunction must be dissolved. It was held by Lord *Cottenham*, C., discharging his honor's order, that by the notice given by the plaintiff, the plaintiff and the railway company were immediately placed in the relative situations of vendor and purchaser, and that the company could not eject the plaintiff until they had paid the purchase money in respect of such interest in the premises as then belonged to the plaintiff. It was questioned whether the effect of the agreement, and the notice of the plaintiff, was or not to convert the determinable lease into an absolute terms of years. (*Doo v. London and Croydon Railw. Co.*, 1 Railw. C. 257; 3 Jur. 253.)

Compensation for injuries to tenants from year to year.

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A railway company's act required tenants from year to year (among others) to deliver up possession of their lands, if required by the company, six months after notice, whether such notice was given with reference to the time of the *commencement of the tenancy or not, the company compensating the tenant for his unexpired term or interest. A tenant from year to year under a Christmas holding, who, on a reasonable expectation that his landlord would not put an end to the tenancy, had made improvements on his land, received in January notice to quit in six months, and at the Michaelmas following, possession was demanded by the company. The company then finding that it was not a Michaelmas holding, told the tenant he might retain possession till Christmas. The tenant remained in possession till after that period: it was held, that as he had held over after notice

his situation was the same as if a regular landlord's notice had been given, and that he was not entitled to compensation, the court being of opinion that the true construction of the act of parliament is, that the company might either give the ordinary landlord's notice, ending with the current year of the tenancy, in which case no compensation would be due, or six months' notice under the act to be given at any time, in which case the tenant would be entitled to compensation for the value of the term between the expiration of the six months' notice and the time when a regular landlord's notice would have expired. But in order to entitle the tenant to such compensation, the premises must be given up. If the company inform the tenant that he may hold the premises till the end of the current year, and he chooses so to do, the situation of the parties is the same as if a regular landlord's notice had been originally given, and the tenant is entitled to no compensation, because he has voluntarily retained the possession. (*Reg. v. London and Southampton Railw. Co.*, 10 Ad. & E. 3; 2 Per. & D. 243; 1 Railw. C. 717.)

The owner of a freehold estate, which was in the occupation of a yearly tenant, contracted to sell it to a corporate body for a sum of money, which was paid into court. The tenant received due notice from the owner to quit at the end of six months, but he remained in possession, without the consent either of the vendor or the purchaser: it was held, that he was not entitled to any portion of the purchase money as compensation for his interest in the estate. (*Ex parte Nadin*. Law J., 1848. Ch. 421.)

The defendant was tenant from year to year of premises which he occupied at a rent payable half yearly, viz., on April 1st and October 1st; on the 23rd January, 1838, he received from a railway company (under the powers of their act) notice to quit at the end of six months, and on the 25th July he gave up possession to them without applying for or receiving compensation for his interest in the premises to which he was entitled by the act: it was held, that he was liable to his landlord for the rent up to October, 1838.

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 C. 19. 714.)
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A. was tenant of a farm over which two railways passed, in respect of which tenant's damages were payable to the owner of the land or to his lessees or tenants. A. received *the money. It was held, that if the land covered by the railways passed to A. by the agreement under which he became tenant, the owner could not recover the money as money had and received to his use. (*Wilson v. Anderson*, 1 Carr. & K. 544.)

Tenant at
 will.

By the Liverpool and Manchester Railway Act it was provided, that the purchase money to be given by the railway company for lands, &c. taken, and the compensation they were to make for damages to lands, &c., and for detriment, injury, damage, loss, inconvenience or prejudice sustained by owners and occupiers, should be ascertained, in case of disagreement, by a jury, who were to assess compensation for the damages to be sustained by any person being owner or occupier of or interested in such lands, &c., for the detriment, &c. which should accrue to him by reason of the making of the railway, or of the execution of the company's power; such damages to be settled distinctly from the value of the lands; and every tenant at will, lessee for a year, and other person in possession of lands, &c. through which the railway was intended to pass, not having any greater interest therein than as tenant at will or lessee for a year was to give up possession at six month's notice; but where such tenant was required to give up possession before the expiration of his term or interest, the company were to make compensation for the value of the unexpired term or interest, to be settled, if necessary, by a jury. The company gave notice as above to a party whose lease had been several times renewed for terms of seven years, and whose landlord, at the time of the last renewal, had declined to renew for fourteen years, but assured the tenant that he would not be turned out at the end of seven. The tenant afterwards laid out money in improvements. During the seven years

the landlord sold the reversion to the company and died. It was held, that the tenant had no interest for which the company were bound to make compensation under the act. (*Rex v. Liverpool and Manchester Railw. Co.*, 4 Ad. & E. 650; 6 N. & M. 186.)

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Where the statute enacted, that if at any time thereafter any person should sustain any damage in his lands, tenements, &c. by reason of the execution of any of the powers of that act, and for which a compensation was not thereinbefore provided, then and in every such case such damages should be assessed by a jury as before directed with respect to such damages, &c. as were therein provided for; a person whose works had been injured by the erection of the company's works, but whose property was not mentioned in the schedule to the act or book of reference, or marked in the map or plans, was held to be entitled to compensation for the consequential injury thus occasioned. (*Rex v. Nottingham Old Water Works Co.*, 5 Nev. & M. 498; 6 Ad. & E. 355.)

Under a canal act the land over which the canal passed was purchased by the company, but the coal-mines and coal were reserved to the owners, their heirs and assigns, who were to be at liberty to work the mines *so as not to injure the canal*. A., the owner of land over which the canal passed, sold it to the company, and afterwards leased the coal up to the side of the canal on one side, and up to the towing path on the other, to B. A. subsequently contracted with the company for the sale to them of the coal under the canal and towing path, and eight yards on each side, which they required for the safety of their canal. It was held, that B. was entitled to compensation in respect of the interest in the coal which he had acquired under the lease, viz., the profit to be derived from the coal when gotten, after deducting the expenses of getting it. Where the legislature has provided a competent tribunal, and has given to it a certain jurisdiction, and made its decision final, no equity can be founded on an allegation that such tribunal is incompetent to decide questions properly within its jurisdiction.

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Injury to
lights of
houses.

If any inconvenience arise from the legal exercise of that jurisdiction, the legislature alone can apply a remedy. (*Barnsley Canal Co. v. Twibill*, 3 Railw. C. 471; 7 Beav. 19; Law J. 1844, M. R. 434.)

By a railway act it was provided that nothing in the act contained should authorize the company to take, injure, or damage, for the purposes of the act, any house or building which was erected before the 30th November, 1835, without the consent in writing of the owner or other person interested therein, other than such as were specified in the schedule to the act, unless the omission therefrom proceeded from mistake, &c. A subsequent clause contained provisions for settling all differences which might arise between the company and the owners or occupiers of any lands, which should be taken, used, damaged or injuriously affected by the execution of any of the powers granted by the act, and for the payment of satisfaction or compensation as well for damages already sustained as for future temporary or perpetual or any recurring damages; it was held that the company were liable, in an action on the case, to the reversioner of a house erected before the 30th November, 1835, and not specified in the schedule, for damage done to it by the obstruction of its lights by a railway station erected by the company under the act, and by the dust, &c. drifted from the station and embankments into the house, and that the plaintiff was not bound to come in under the compensation clause for a damage which could have been foreseen when the works were made. (*Turner v. Sheffield and Rotherham Railw. Co.*, 10 M & W. 425; 3 Railw. C. 222.) It is questionable whether in such cases, where the consequential damage to such house, &c. could not have been foreseen, as by stopping springs communicating therewith, such inconvenience will not afford a ground for limiting the general expression, and exempting the company from liability to an action. (*Id* See *Boulton v. Crowther*, 2 B. & C. 703, and the cases there cited; *Sutton v. Clarke*, 6 Taunt. 34.) In the principal case, *Parke, J.*, said, as the house was erected before the 30th November, 1835, the company ought to have con-

when "any personal property is taken for the use of the public, the owner ought to receive an equivalent *in money*." A railroad is an improved highway, and property taken for a railroad is as much taken for public use within the purview of the Constitution as if taken for any other highway, and the Legislature have as good a right to delegate to a railroad company the power to take private property for a railroad, as to a turnpike company to take it for a turnpike road. (*White River Turnpike Co. v. Vermont Central Railroad Co.*, 21 Vermont 590; *Beekman v. Saratoga and Sche. Railroad Company*, 3 Paige 45; *Whiteman v. Wilmington and Susquehannah Railroad Co* 2 Harrington, 514; *Bloodgood v. Railroad Co.*, 18 Wendall 9.) And it is the right of *eminent domain* which gives to a Legislature the authority to control private property for public uses, subject to the condition, that compensation be made for it. (*Hamilton v. Annapolis and Elk Ridge Railroad Co.*, 1 Maryland, Chancery Decisions, 107; *Harness v. Chesapeake & Ohio Canal Co.*, 1 Maryland, Chan. Decis. 248.) And though a railroad company derives its powers from the State, yet it does not act in behalf of the State, or as its instrument or agent, but under a special grant acquired for a valuable consideration for the promotion of its own direct and private advantage. (*Bradley v. New York and New Haven Railroad Co.* 21 Connecticut, 294.) It seems to be well settled, that the private property of a corporation and even their franchise are equally liable to be taken for public use, as the property of individuals. In both cases however, compensation must be made. (*Armington v. Barnett*, 15 Vt. 745; *West River Bridge Co. v. Dix*, 16 Vt. 446; same case in Error in Sup. Court of U. S., 6 Howard U. S. 507; *White River Turnpike Co. v. Vermont Central Railroad Co.*, 21 Vt. 594; *Boston Water Power Company v. B. & W. Railroad Co.*, 23 Pick. 360; *Enfield Toll Bridge Co. v. H. & N. H. Railroad Co.*, 17 Conn. 454.)

The case of *Livermore et al v. Jamaica*, 23 Vt., 362, proceeds upon the ground, that the taking of land for a highway, and of course for a railroad, is not such a taking of the property to public use, as to come within the purview of the Constitution requiring compensation to be made, but *quære*.

The Constitution of Vermont would seem to require the compensation for the intrinsic value of the property taken, to be made in

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c. 18.

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1, Incipient proceedings may be had without compensation; 2, but must be followed up and compensation be made; 3, or trespass will lie.

money, and such was the view of the court in the case in the 23 Vermont 362.

In Maine, under their Constitution, which provides that "private property shall not be taken for public uses, without just compensation," it has been held, the Legislature having provided the means to be pursued to have compensation made for property taken for public use, may authorize an exclusive occupation of the property temporarily, as an incipient proceeding to the acquisition of a title to it, or to an easement in it; but that such incipient proceeding will be null and void unless it is followed up and completed within a reasonable time, and the party become liable to an action of trespass, if compensation be not made or tendered in a reasonable time from the commencement of the incipient proceedings. (*Cushman v. Smith*, 34 Maine 247.)

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The Constitution of Kentucky, guarantees a just compensation, to be made, before private property can be taken for public use, and it was held, that the owner was entitled to have the intrinsic value of the property, at least, paid him in money; although incidental damages beyond the intrinsic value of the land might be set off against incidental advantages. (*Rice v. Turnpike Co.*, 7 Dana 81; *Jacob v. Louisville*, 9 Dana 114; see also *the People v. Brooklyn*, 6 Barber 209.) Although it has been held in Ohio, that "benefits conferred upon property taken for public use, may be set off against its value." (*Brown v. Cincinnati*, 14 Ohio 541; *Symonds v. Cincinnati*, 14 Ohio 147.) And the same construction has been given the Constitution of Indiana, which provides that "just compensation shall be made for private property taken for public use." (*McIntire v. State*, 5 Blackford 384.)

Whether the payment of the compensation must precede the taking of private property for public use, must depend upon the construction to be given the language of the Constitution, or of the charter or law, under which it is taken. The bill of rights in Mississippi, restrained the right to take private property for public use, by requiring "a just compensation first to be made therefor;" and the court held, that a law authorizing a railroad company to take private property, without providing for such previous compensation was unconstitutional and void. (3 Howard, Mississippi 240; see also *Harrisburgh v. Craigh*, 3 Watts and Serg. 460); so in *Stewart v. the Raymond Railroad Co.*, (7 Smead & Marshall 568),

it was held, that the land damages must be paid, before the right of way vests in the corporation.

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The Constitution of Wisconsin, art. 1st, sec. 13, requires a just compensation *first* to be made for the land taken, and it was held, that no entry upon the land to construct a railroad could be justified by force of law, until compensation had been in fact made, though an entry for exploration and location of a railroad may be justified, if the charter gives such a right even before compensation, and the measure of damages was held to be the fair value of the land, estimating the damages and benefits to the owner, exclusive of the expense of erecting and maintaining fences. (*The Milwaukee and Mississippi Railr. Co. v. Elbe* in error, 4 Chandler 72.)

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Where the charter provided, for the assessment of land damages, and that *security should be given for the same*, it was held, that no title would vest in the company, until the security had been given. (*Carr v. Georgia Railroad and Banking Co.*, 1 Kelly Georgia, 524) But it was held to be no objection to the constitutionality of a law, that it authorizes a railroad company to enter upon private property and make preliminary or final surveys before compensation is made, provided the act makes suitable provision for compensation, in case the land shall be eventually taken for such railroad. (*Polly v. S. & W. Railroad Co.*, 9 Barber 449. And in *Smith v. Hellman*, 7 Barber 416; and in *Pittsburgh v. Scott*, 1 Barr 309, it was held, that it was not necessary that the compensation should have been assessed and paid before the property could be actually appropriated to public use, but that it was sufficient, if an adequate remedy was provided, by means of which satisfaction could be obtained, without any unreasonable delay.

Although a railroad may have organized under the law, and have expended money in making their survey, maps and profiles, yet, if the law empowers the company to acquire a right of way, upon the legislature having approved of the route and terminations of the road proposed to be constructed, such approval is necessary before the company can proceed to condemn lands for the purpose of obtaining a right of way. (*Gillinwater v. the Mississippi and Atlantic Railroad Co.*, 13 Illinois 1.)

Where compensation has been made to an individual for land ta-

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ken for a street in a city, the city has the right to appropriate the land so taken to all such legitimate uses and servitudes as custom and the public good require. (*Plant v. Long Island Railroad Co.*, 10 Barber 26.) And the legislature are not by the constitutional provision that private property shall not be taken for public use without compensation, restrained from granting to a railroad company the privilege of laying rails on the streets of a city or town, and using the railroad so made. (*Henry v. Pittsburgh and Alleghany Bridge Co.*, 8 W. & S. 87; *Mifflin v. R. R. Co.*, 4 Harris 192.) And the authority of the State, in respect to their general and more extended uses, is paramount. (*Philadelphia and Trenton Railroad*, 6 Wharton 25); and it is competent for the legislature to require of the railroad company, payment to be made, for consequential injuries to the landholders by way of additional damages. (*Mifflin v. Railroad*, 4 Harris 182.) And it is said by *Bell, J.*, page 193, that "it may now be taken as the ascertained rule, that the legislature may legally omit a provision for merely *consequential damages*, when creating a corporation to construct an improvement for the common benefit." Although such omission is not to be favored.

See also *Monongahela Navigation Co. v. Coons*, 6 Watts & S. 101, and *Radeliff v. Mayor of Brooklyn*, 4 Comstock 195, and *Hatch v. Vermont Central Railroad Co.*, 25 Vermont 49, where it was fully held, that the Legislature was not bound by the Constitution, to provide for the payment of consequential damages where lands were *merely injuriously affected*, for the reason that in such case, no private property was taken for public use, within the purview of the Constitution. See also *Keusy v. Louisville*, 4 Dana 154; and the grading of a street, or alley *already* dedicated to public use, is not an exercise of *eminent domain*, so as to require compensation to be made, if done skilfully and discreetly. (*Taylor v. City of St. Louis*, 14 Miss. 20.)

May recover for consequential damages, if the railroad charter will warrant it.

The charter of the New York and New Haven Railroad Co., provided, "that the company might enter upon and use all such real estate as should be necessary for them, and that they should be holden to pay all damages that should arise to any person or persons, and if the parties could not agree upon them, a committee was to assess just damages to the person or persons whose real estate had been taken or *injured*. It was held, that though a high em-

bankment had been made in front of the plaintiff's house, and a deep excavation for the bed of the railroad, in the land adjoining the plaintiff's, and so near his buildings as to injure them, still his property had not been taken for public use within the meaning of the Constitution of the State but that under the charter the plaintiff was entitled to compensation, and that as none had been made, the plaintiff could recover for such consequential damages, as he had sustained. (*Bradley v. New York & New Haven Railroad Co.*, 21 Conn. 294)

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Quære, Should not the remedy have been taken under the Charter, instead of an action at Common Law?

In a river that is navigable, in which the tide ebbs and flows, the land below high-water mark belongs to the people of the State in their sovereign capacity, and a Railroad Corporation being empowered by their charter to build a railroad from Albany to New York, raised an embankment for their railroad track between high and low-water mark on the margin of the Hudson River in front of and adjoining to the plaintiff's farm, forming a barrier to the passage of boats, &c., without his consent; and without making him any compensation for the injury done him, and it was held, the railroad company had the right to make the embankment. and that the plaintiff could sustain no action for damages. (*Gould v. Hudson River Railroad Co.*, 12 Barber 616.

The act of the Legislature of Mississippi, (1823.) vested in the city of Jackson the title to the streets within its limits; and it was held, the Legislature could not dispose of them, except for public use, and then only upon just compensation, and that the company could not have the right to run their road through the streets of the city, without the consent of the Corporation; or without the assessment and payment of damages according to law. (*Donna-hue v. State*, 8 Smead and Marshall 649.)

The city may, it was further held. regulate the mode of propelling the cars within its limits, whether by steam or horse power, and the rate of their speed. (*Ib.*)

Quære, whether the owners of lots adjoining the railroad track could claim compensation for damages. (*Ib.*)

Where a charter of a railroad company authorizes it to establish a railway along a public street to a particular point, and to run a locomotive on the road, the company will be entitled to make a

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Who are entitled to land damages; and who should be parties in their assessment and who not; and when they may be assessed.

turn out from the main track, to communicate with a depot, erected by them near the terminus of the road; containing the machinery necessary for reversing the engine, &c., where no objection exists to the turn-out at that particular point, subject however to the police power of the municipality, and constructed and used so as to interfere, as little as possible, with the free use of the public highway. (*New Orleans & Carrollton Railroad Co. v. Second Municipality*, 1 La. Ann. Rep. 128.)

It may be well to consider, who are entitled to land damages, and who should be made parties in their assessment, and when they may be assessed.

In the case of the land of one deceased being taken for a Railroad, it is held in Massachusetts that the heir, and not the administrator, is entitled to the damages for such taking, and that he should prosecute for the recovery, even though the estate had been previously represented insolvent, and the administrator afterwards obtained a license to sell the real estate for the payment of debts. (*Boynton v. Petersburg and Shirley Rail Road Company*, 4 Cushing 467.) But *Query*, if the lands descend to the administrator as assets in the first instance, as in Vermont, the heir having no right to sustain ejectment or trespass until a distribution in the probate office, is not the right to damages at law vested in the administrator.

A tenant for life may have a proceeding for damages done to her estate, without joining the remainder man. (*Rail Road v. Boyer*, 13 Penn. 497.) But a tenant in common cannot have the damages assessed in his own name though he have authority from his co-tenant so to do, and the irregularity is not cured by the co-tenant afterwards granting a formal release. (*Rail Road v. Butcher*, 7 Watts 33.) In Massachusetts, where the damages sustained by a tenant for years had been assessed, and on appeal had been reversed by a jury on the petition of such tenant, and the verdict set aside by the court, and the case remanded to the County Commissioners, it is, it seems, competent for the Commissioners, on motion, to dismiss the petition for a jury and bring forward the original petition and summon in the reversioner to become a party thereto, and then proceed to estimate the whole damages, and apportion the same between the parties interested, and that if such

proceeding is objectionable, it can only be objected to by the lessee, and not by the Rail Road Company. (3 Cushing 58.)

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If flats appurtenant to, and incident to upland, are taken for a Rail Road, the Commonwealth has no interest therein by way of easement, which requires the damages for taking the same, to be assessed in the manner provided by the Revised Statutes of Massachusetts, Chap. 24, sec. 48, 49, 50, where there are several parties, having several estates, or interests, at the same time in the land. (*Walker v. Boston and Maine Rail Road Company*, 3 Cush. 1.)

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And if a purchaser of land deeds it back in trust to secure the purchase money he cannot grant a right of way over the land, except subject to the deed of trust; and hence it must follow, that if the land was taken by compulsory process by the Railroad Company, the person having the legal estate would be entitled to land damages. (See *Stewart v. Raymond Railroad Company*, 7 Smead and Marshall 568.)

But a mortgagee of land taken for a Railroad, need not be made a party to proceedings by the mortgagor for the assessment of damages, provided he gives his consent thereto by a writing filed in the case. (*Meacham v. Fitchburg Railroad Co.*, 4 Cushing 291.)

Where a railroad was located, over lands held by the State as a body politic, for a particular purpose, but no design was expressed in the act on the part of the Legislature to aid the corporation in their undertaking, it will not be held that it was the intention of the Legislature to grant the lands of the Commonwealth, or any easement in them, to the corporation, without compensation, and the Commonwealth may have the same proceedings for the assessment of damages, as the law provides for individuals. (*The Commonwealth v. Boston and Maine Railroad Co.*, 3 Cushing 25.)

Commissioners may assess damages for the acts of a Railroad Company, when those acts are such as the corporation by their engineers, agents, or workmen, may rightfully perform by virtue of their charter, and it makes no difference whether the Corporation admit or deny their liability. (*Vermont Central Railroad Co. v. Baxter*, 22 Vermont 365.)

By an act to incorporate the Philadelphia, Germantown, and Norristown Railroad Company, it was made the duty of the Company to construct a sufficient causeway, wherever it should be

8 & 9 Vict. necessary, to enable the owner of land, through which the road
 c. 18. might pass, to cross over or under the road, and it was declared
 Sect. 68. they should be liable in an action for damages, to any person ag-
 grieved.

[308] The company laid out their road over the land of the plaintiff, so as to prevent his passage from one part of his farm to another, but they did not complete the road. By a supplementary act, they were authorized to change the route of the road and it was declared, that any person injured by the change of the route, might apply to the Court of Common Pleas for the appointment of men to assess the damages, &c.

Held also, that the supplementary act repealed the original act, so far as respected the remedy by action, and that the plaintiff could not maintain an action of trespass to recover damages, as at common law, but was confined to the remedy given by the supplement. (*Knoor v. Germantown Railroad Co.*, 5 Wharton 256.)

Of the assess-
 ment of dam-
 aages and
 the proceed-
 ings therein,
 and when
 costs are al-
 lowed.

In the assessment of land damages the plaintiff's title to the land is properly in issue, although upon exception to the inquisition, in the absence of proof on the subject, it will be presumed the jury decided correctly. (*Directors of the Poor v. Railroad Co.*, 7 Watts and Serg. 236. And in case the Commissioners should refuse to assess damages, on the ground that the party applying for them does not own the land, he is entitled to have their judgment revised by a jury. (*Carpenter v. Bristol*, 21 Pick. 258.) And where land has been condemned for the use of a Railroad, and the inquisition returned to and confirmed by the proper authority, the propriety of the condemnation, and the use of the property, cannot be drawn in question in an *incidental* or *collateral* proceeding. (*Hamilton v. Annapolis and Elk Ridge Railroad Co.*, 1 Maryland Chan. Decisions 107.)

Where there is a special mode of ascertaining damages provided in a charter the general law relating to Railroads of 1850 in New York, it was held did not apply, and also that the company could change their route at any time before the Report of the Commissioners had been confirmed, and new Commissioners were appointed upon the Company's being ordered to pay the costs of the first Commission. (*Hudson River Railroad Co. v. Outwater*, 3 San-
 ford 689).

(r) A notice, under the usual power contained in railway acts, to treat for part of a rope-walk in the line of the railway was accompanied by a diagram or plan of the entire rope-walk; indicating by colored lines the manner in which the railway would intersect it, and the portion required to be treated for, but having no scale of admeasurement appended to the diagram or plan. The notice was held to be sufficient; for it appeared clear on the face of the plan what was the quantity of land intended to be taken, and what were the dimensions, and the particular manner in which the land intended to be taken was to be cut out of the whole of the premises belonging to the plaintiffs. (*Sims v. Commercial Railway Co.*, 1 Railw. C. 431; 4 My. & Cr. 124.)

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What a sufficient notice.

The company are bound by the notice to purchase, which describes the property wanted, and which is to be deemed a declaration on the part of the company of an option given to *them by the statute to purchase all the premises mentioned in the schedule to the notice. It was so considered where an act incorporated the Hungerford Market Company, and authorized them to purchase certain scheduled hereditaments, and to give notice to parties to send in their claims. It was held, that, after giving the notice, the company could not abandon the purchase, though they offered to pay all reasonable costs incurred by an occupier in consequence; but that the act obliged them, on his demand, to issue their warrant for summoning a jury, and the court granted a mandamus to compel them to do so. (*Rex v. Hungerford Market Co.*, 1 N. & M. 112; 4 B. & Ad. 327.)

The effect of the notice.

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When parties have obtained an act of parliament enabling them to purchase property, no power is reserved to them of countermanding a notice once given, in case of disagreement as to terms, but they may summon a jury to ascertain them—that is their protection against an exorbitant demand. If they were not bound by their notice, it would follow, that after giving it, they would be free during the period allowed for purchases by the special act to take the property or not at their discretion, and the owner would be at their mercy during that time. (*Rex v. Hungerford Market Co.*, 4 B. &

8 & 9 VICT. Ad. 327; see *Rex v. Commissioners of Market Street Man-*
 c. 18. *chester, ib. 333, n.)*
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A railway company have no power to recall a notice to take land, except with the concurrence of the other party, and to substitute another notice. If the notice when given was allowed to be recalled and varied at the pleasure of the companies, they might continually plague and perplex proprietors with new notices, so that it would be impossible for them to know how to deal with the remainder of their land. The first valid notice is the one which is binding upon the parties. A railway company gave notice to a landowner, that they intended to take a certain portion of his land, under the powers of their act, for the purposes of their railway, which notice they alleged, and on the pleadings it was admitted, to be invalid. The company subsequently gave a second notice that they should require 20 perches of land; but before anything was done on either side they gave a notice of withdrawal of their second notice, and then served a third notice on the plaintiff, whereby they stated that they required one perch only of the plaintiff's land. The plaintiff filed a bill and moved for an injunction to restrain the company from proceeding on the last notice. It was held that the withdrawal of the second notice by the company not having been assented to by the plaintiff, that notice constituted a binding contract on the company, and the last notice must be treated as a nullity. (*Tarney v. Lynn and Ely Railw. Co.*, 4 Railw. C. 615; Law J. 1847, Ch. 282. See *Reg. v. Commissioners of Woods and Forests*, 19 Law J. Q. B. 497, where notice to treat was held not to operate as a contract.) (1)

Taking land. (1) Where a railway company had given the notices, required to be given by their act, to all parties interested in certain lands, which they took, for the purposes of their act; it was held, that the company could not by obtaining possession of the legal estate in such lands, defeat the right of subsequent incumbrances (*Hill v. the Great Northern Railway Co.*, 23 Eng. Law and Eq., 565).

Second nc-

A railway company is entitled, under the provisions of this

act, to give a second notice to the same landowner for *land within the limits to which their compulsory powers extend, if from unforeseen circumstances the land taken under the first notice, turn out to be insufficient for the authorized purposes of their railway. (*Stamps v. Birmingham and Stour Valley Railw. Co.*, 2 Phil. C. C. 673; 6 Rail. C. 123.)

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tice to take
lands may
be given.
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A railway company were authorized by their first act to take lands compulsorily of not more than twenty-two yards in width except for certain purposes therein specified. The lands of the plaintiff mentioned in the schedule to the act were described in the parish plan and book of reference. The company agreed with the plaintiffs for a certain portion of their lands, and the price was fixed by arbitration. By a second act of parliament, the company were authorized to deviate, but the schedule thereto contained the same description of the plaintiff's lands as the schedule to the first act. By a third act the company were authorised to enlarge their station, and the powers of the two previous acts were extended to that act, which however did not contain a new schedule. Subsequently to the passing this last act, the company served the plaintiffs with a notice that, under the authority of the three acts or one of them, they would require a certain portion of the land, containing in the whole 5a. 1r. 22p., parcel of that in the schedule to the act. Subsequently the company gave a notice similar to the preceding one, save that the quantity required was different, namely, 5a. 1r. 31p. Neither of these notices stated the purposes for which the land was required, although part of it was beyond the width of twenty-two yards. The plaintiffs filed their bill for an injunction insisting that the company had exhausted their compulsory powers, and that the notices were defective and vague. (*Simpson v. Lancaster and Carlisle Railw. Co.*, 11 Jur. 879; 4 Railw. C. 625.) It was held that the company had not, by taking the land for their railway, exhausted the powers of the first act so as to preclude them from taking more land for their station, and it being shown by affidavit that the land

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was required for a station, the plaintiff's application was refused with costs.

The moment the company have given the proper notice, and have, in the way which the act prescribes communicated to the proprietor what land they require, the relative situation of vendor and purchaser is created by such notice. (See *Doo v. London and Croydon Railw. Co.*, 1 Railw. C. 257 *ante*, p. 249; *Salmon v. Randall*, 3 My. & Cr. 439; *Edinburgh, Perth and Dundee Railw. Co. v. Leven*, 1 Mac. H. L. C. 284.) It gives the proprietor a right to insist upon the company taking what they have stated their intention to take by the notice—a right to be enforced by the Court of Chancery, or by a court of law by mandamus. It therefore constitutes a contract, or at all events it constitutes the situation of vendor and purchaser; for which, however, the sum to be paid, which is a material part of ordinary contracts, remains to be ascertained. (*Stone v. Commercial Railw. Co.*, 1 Railw. C. 400, 401; 4 My. & Cr. 124.) But it by no means follows that the court of chancery will therefore take on itself

[*261] *the specific performance of such sales. If indeed the proceedings lead to an agreement, the court might do so, although originating in the compulsory power, the purchase would have to be effected under a private agreement; and so other cases may arise, but whether if the case depended entirely upon the notice of taking the land, not followed by any agreement, or indeed by any claim on the part of the owner—the amount of the purchase money therefore not being ascertained—is quite another question. (*Adams v. London and Blackwall Railw. Co.*, 6 Railw. C. 286; 2 Hall & T. 285; 2 Mac. & G. 118.)

A railway company under the powers of their act, which was incorporated with this act, gave notice to the owner of their intention to purchase part of his property; but not requiring immediate possession, they took no steps to complete the purchase. The land owner filed his bill for the specific performance of the contract created by the notice. It was held that the Court of Chancery has jurisdiction in a

suit so instituted, to make a decree which will have the effect of compelling the company to set in operation the machinery provided by this act, and for ascertaining the amount of the purchase money and compensation. The remedy by mandamus is not specified in the act, and there is nothing to deprive the party of every remedy which law or equity furnish for breaches of contract. The circumstance that the act entitles the party to have the price determined by a jury, was thought insufficient to oust the court of its jurisdiction to decree specific performance to the contract. (*Walker v. Eastern Counties Railw. Co.*, 5 Railw. Ca., 469. See *Adams v. London and Blackwall Railw. Co.*, 6 Railw. Ca. 281; 2 Mac. & G. 118; 2 Hall & T. 285.)

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Sect. 18

The owner of houses, which were liable to be taken for making a railway under an act of parliament, received notice under this section from the promoters, that the houses would be required for the railway, and the company demanded the particulars of his interest therein, and stated their willingness to purchase. The particulars were furnished by the landowner, and 4500*l.* was claimed as compensation for taking the property, and he required payment thereof, or that a warrant should be issued by the company to summon a jury to assess the amount. The company took no further step in the matter: it was held that the landowner could not maintain an action to recover the 4500*l.* (*Burkinshaw v. Birmingham and Oxford Junction Railw. Co.*, 6 Railw. C. 600; 5 Exch. 475; 20 Law J. Exch. 246.)

The relation of vendor and purchaser being constituted, the purchase is to be completed according to the provisions, not of the contract, but of those arrangements which the act of parliament has substituted in lieu of the contract, in a case where no contract can take place. It seems that the value of the property is to be fixed as it stood at the time when the notice was given. (*Salmon v. Randall*, 3 My. & Cr. 449, 450. See 8 & 9 Vict. c. 18, s. 125.) As to the necessity of the notice appearing upon the face of the proceedings, see note to sect. 46, 8 & 9 Vict. c. 18, *post.*)

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Service of
notices on
owners and
occupiers of
lands.

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Service of
notices on a
corporation
aggregate.

If parties fail
to treat, or in
case of dis-
pute, ques-
tion to be
settled as
after men-
tioned.

Disputes as
to compensa-
tion where
the amount
claimed does
not exceed
50*l.* to be
settled by
two justices.

XIX. All notices required to be served by the promoters of the undertaking upon the parties interested in or entitled to sell any such lands shall either be served personally on such parties or left at their last usual place of abode, if any such can after diligent inquiry be found, and in case any such parties shall be absent from the united kingdom, or cannot be found after diligent inquiry, shall also be left with the occupier of such lands, or if there be no such occupier, shall be affixed upon some conspicuous part of such lands.

XX. If any such party be a corporation aggregate, such notice shall be left at the principal office of business of such corporation, or if no such office can after diligent inquiry be found, shall be served on some principal member, if any, of such corporation, and such notice shall also be left with the occupier of such lands, or if there be no such occupier, shall be affixed upon some conspicuous part of such lands.

XXI. If for twenty-one days after the service of such notice, any such party shall fail to state the particulars of his claim in respect of any such land, or to treat with the promoters of the undertaking in respect thereof, or if such party and the promoters of the undertaking shall not agree as to the amount of the compensation to be paid by the promoters of the undertaking for the interest in such lands belonging to such party, or which he is by this or the special act enabled to sell, or for any damage that may be sustained by him by reason of the execution of the works, the amount of such compensation shall be settled in the manner hereinafter provided for settling cases of disputed compensation (s).

(s) It seems questionable how far a party failing to state any of the particulars of his claim for the twenty-one days, is thereby precluded from afterwards relying on such particulars. (*Barker v. North Staffordshire Railw. Co.*, 12 Jur. 589; 5 Railw. C. 401; 2 De. G. & S. 55.)

XXII. If no agreement be come to between the promoters of the undertaking and the owners of or parties by this act enabled to sell and convey or release any lands taken or required for or injuriously affected by the execution of the undertaking, or any interest in such lands, as to the value of such lands or of any in-

terest therein, or as to the compensation to be made in *re- 8 & 9 Vict.
spect thereof, and if in any such case the compensation claimed c. 18.
shall not exceed fifty pounds, the same shall be settled by Sect. 23
two justices. [*263]

(1) An adjudication of two justices, under this section, of a sum below fifty pounds, to be paid by a railway company, as compensation to a party whose lands have been injuriously *affected*, by the exercise of their statutory powers, is an order within statute 11 & 12 Vict. c. 43. sec. 1; and by the 11th section of that statute is bad, if the complaint on which the order is founded, be made more than six calendar months after the cause of complaint arose; and such order may be quashed upon *certiorari*. (In *re James Edmundson*, 24 Eng. Law and Eq., 169.)

XXIII. If the compensation claimed or offered in any such case shall exceed fifty pounds, and if the party claiming compensation desire to have the same settled by arbitration, and signify such desire by notice in writing to the promoters of the undertaking, before they have issued their warrant to the sheriff to summon a jury in respect of such lands, under the provisions, hereinafter contained, stating in such notice the nature of the interest in respect of which such party claims compensation, and the amount of the compensation so claimed, the same shall be so settled accordingly; but unless the party claiming compensation shall as aforesaid signify his desire to have the question of such compensation settled by arbitration, or if when the matter shall have been referred to arbitration, the arbitrators or their umpire shall for three months have failed to make their or his award, or if no final award shall be made, the question of such compensation shall be settled by the verdict of a jury, as hereinafter provided (*t*).

Compensation exceeding 50*l.* to be settled by arbitration or jury, at the option of the party claiming compensation.

(*t*) The three months allowed by this section to "the arbitrators or their umpire," for making their award, is not one and the same period; but the umpire has a new period of three months for making his award, from the time when the arbitration devolves upon him. (*Skerrat v. North Staffordshire Railw. Co.*, 2 Phill. 475; 5 Railw. C. 166.) Lord *Cottenham*, C., construed this clause thus: that the arbitrators may have twenty-one days in the first instance,

Time for making umpire's award.

8 & 9 VICT. they may enlarge it for themselves to the expiration of the
 c. 18.
 Sec. 23. three months. They have no longer time for themselves to do that; but whenever it happens, either at the expiration of the twenty-one days or the expiration of the enlarged time, that the duty of the umpire commences, then the umpire has three months to perform his duty. (*Ib.* p. 183.)

Cases of arbitration under this act.

Arbitrators having been duly appointed to ascertain the value and compensation for damages between a landowner and a railway company, they appointed an umpire. A meeting was held and witnesses were examined, and the proceedings adjourned to the following day, but the company's arbitrator sent notice that he could not attend. The other arbitrator and the umpire, against the protest of the company's solicitor, who retired, went on with the case and examined another witness. The umpire made an award without any further proceedings being had. On a motion on behalf of the company, the award was set aside. (*Hawley v. North Staffordshire Railw. Co.*, 5 Railw. C. 383; 2 De. G. & S. 33; see *In re Marquis of Donegal*, 12 Ir. L. R. 539.) Parties having acted under an award are in general estopped [*264] *from afterwards contesting its validity. (*Ex parte Harrison*, 13 Jur. 381.)

A. B. having acted as agent for a purchaser, and as such made an offer to the vendor of a price for a certain piece of land, was afterwards appointed arbitrator on behalf of the purchaser; and the vendor then appointed an arbitrator to act with him in setting the price to be paid for the land: it was held on a motion by the vendor to set aside the award, that he had waived an objection to the purchaser's arbitrator. (*Re Elliot and South Devon Railw. Co.*, 12 Jur. 445; 2 De G. & S. 17.) The vendor's arbitrator was unknown to the vendor, a surveyor of, and shareholder in, a company materially interested in the success of the undertaking for which the land was bought, and the umpire chosen by the vendor's arbitrator from a list furnished by the purchaser's arbitrator was, also unknown to the vendor, a surveyor employed in some matters by the same company: it was held, on the

same motion, that there were not such objections to either as to afford judicial grounds for setting aside the award. (Ib.)

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Sect. 23.

The award ought to find the particular interest of the parties, whether in fee simple, or for life, or for what other interest. A railway company requiring certain lands for their line, in pursuance of the 18th section of this act, gave notice to L. and H., parties interested, to treat for their purchase. L. and H. thereupon served the company with a notice that, as trustees of H. they had *an estate and interest* in the lands, and claimed 3,344*l.* for the same; and desired to have their compensation settled by arbitration, and they thereby appointed T. as their arbitrator. The company nominated their arbitrator, and the arbitrators appointed an umpire, who proceeded with the reference. At the reference one W. appeared and claimed compensation, alleging that he had an agreement for the renewal of an unexpired lease in the premises. The umpire awarded 1,861*l.* to be paid by the company to L. and H. for the purchase of the fee simple in possession, free from all encumbrances: it was held, first, that the submission was not in compliance with the statute, the claimants not having therein stated the nature of their interest. (*In re North Staffordshire Railw. Co. and Landor*, 6 Railw. Cas. 17; Law. J. 1848. Exch. 350.) It was held secondly that the award was bad, the umpire not having found the nature and value of the interest of L. and H., but the court declined to interfere on motion. (Ib.) It was questioned whether the submission was binding on the parties, by reason of their conduct. (Ib.)

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A railway company requiring the property of landowners, gave notice to them under this act to treat for it. The landowners thereupon gave notice to the company that they were owners and lessees of the land, and that their interest therein was particularly described in a schedule served therewith; that they claimed as compensation for the purchase money and for damages that might be sustained by the execution of the works, 2,180*l.* 8*s.*, and that if that sum was not paid,

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they desired to have the amount settled by arbitration; they *thereby appointing their arbitrator, and requiring the company to appoint an arbitrator on their behalf. In the schedule annexed was included certain pieces of land severed by the railway, and respectively of less than half an acre, which the landowners, under the 93d section of this act, required the company to purchase. The company thereupon served the landowners with a notice, appointing an arbitrator, to whom was to be referred the amount of compensation to be paid by the company for the purchase of the said lands. At the reference, the landowners gave evidence of the value of the small pieces of land mentioned in the schedule, being respectively less than half an acre. The umpire awarded one entire sum for the purchase of the fee simple which the company required, and for the small pieces mentioned in the schedule: it was held, that as nothing had been submitted but the value of the land which the company desired to purchase, and as one entire sum was awarded for that, and the small pieces of land which the landowners required the company to take, the award was bad; but the court refused to set it aside. (*In re North Staffordshire Railw. Co. & Wood*, 6 Railw. Cas. 25; Law. J. 1848, Exch. 354; 2 Exch. 244.) It was questioned whether the award could be supported by reference to the conduct of the parties. (*Ib.*)

Method of
proceeding
for settling
disputes as to
compensation
by justices.

XXIV. It shall be lawful for any justice, upon the application of either party with respect to any question of disputed compensation by this or the special act, or any act incorporated therewith, authorized to be settled by two justices, to summon the other party to appear before two justices, at a time and place to be named in the summons, and upon the appearance of such parties, or in the absence of any of them, upon proof of due service of the summons, it shall be lawful for such justices to hear and determine such question, and for that purpose to examine such parties or any of them, and their witnesses, upon oath, and the costs of every such inquiry shall be in the discretion of such justices, and they shall settle the amount thereof.

Appointment
of arbitrator

XXV. When any question of disputed compensation by

this or the special act, or any act incorporated therewith, authorized or required to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator, to whom such dispute shall be referred: and every appointment of an arbitrator shall be made on the part of the promoters of the undertaking under the hands of the said promoters or any two of them, or of their secretary or clerk, and on the part of any other party under the hand of such party, or if such party be a corporation *aggregate, under the common seal of such corporation; and such appointment shall be delivered to the arbitrator, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as a revocation; and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matter so required to be referred to arbitration, shall have been served by the one party on the other party to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then upon such failure the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters which shall be in dispute, and in such case the award or determination of such single arbitrator shall be final (*u*).

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when questions are to be determined by arbitration.

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(*u*) A railway company having refused compensation for injury done to the premises of B., he, on the 5th of December, served them with a notice under the act, requiring them to appoint an arbitrator on their behalf, and stating that it was his intention to appoint M. as his arbitrator, and that if for the space of fourteen days after that notice the company failed to appoint an arbitrator on their behalf, he would appoint M. to act for both parties. The company having refused to refer the matter to arbitration, B., on the 1st January following, served them with a notice which, after reciting that he had appointed M. as his arbitrator, stated

Appointment of arbitrator.

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Sect. 25. that he then appointed M. to act as arbitrator on behalf of both parties. The arbitrator having awarded a certain sum to be paid to B., the court refused to enforce or set aside the award on motion, intimating their opinion that there was no valid appointment of the arbitrator. (*Bradley v. London and Northwestern Railw. Co.*, 5 Exch. 769; 20 L. J. Exch. 3; 1 Pr. Rep. 597.)

It seems that under this section an appointment by the claimant of an arbitrator to act for both parties is not valid, unless he has previously appointed an arbitrator on his behalf and notified such appointment to the company. (*Ib.* See *London and North Western Railw. Co. v. Bradley*, 6 Railw. C. 551; 3 Mac. & G. 336.)

[*267] A company, under section 25, appointed an arbitrator on 23d March, the claimant another on 6th April. The arbitrators neglected, seven days after request by the company, to appoint an umpire, on which the company applied to the railway commissioners, and they appointed an umpire on 17th May: it was held, that such appointment was in time. (*In re Bradshaw*, 12 Q. B. 562.) The umpire and arbitrators made their declaration under the 33d sect. on 27th May, before the umpires entered on the matters referred: it was held that no objection arose from the lateness of these declarations. (*Ib.*) The umpire made his award on the 23d July: it was held, not too late, he having three months for that purpose under the 23d sect. from the time of the duty devolving on him. (*Ib.* See *ante*, 263, n.)

Where parties agree to refer, in pursuance of the arbitration clauses in this act, a question of disputed compensation for land required by a railway company, and the appointment of an arbitrator on the part of the company is signed by their secretary, an award made under that submission is valid, notwithstanding all the preliminary forms required by this statute have not been complied with, these forms being only necessary where the arbitration is compulsory. (*Collins v. South Staffordshire Railw. Co.*, 7 Exch. 5.)

Where a claim for compensation is referred to arbitration

under this act, the award need not assess the price of the land taken and the damage separately. The arbitrators awarded a sum for the fee simple in possession of the claimant's land, and also for the immediate possession thereof; it was held to be unobjectionable, although it appeared that there was an existing lease of years of part of the land, the claimant having used the same term in his notice of claim. (*In re East and West India Docks and Birmingham Junction Railw. Co. and Bradshaw*, Law J. 1848, Q. B. 362; 5 Railw. C. 527; 12 Q. B. 562.)

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By a deed of submission made between L. and a railway company, after reciting that the company were authorized to take certain lands of which L. was or claimed to be owner, that they had given him notice that they required his lands, and that it was agreed that they should become the purchasers thereof in the mode thereafter pointed out, it was covenanted, that it should be referred to W. T., to determine the value to be paid for the lands; that the purchase money should be paid within three days after the making of the award and "thereupon L. should execute a conveyance, subject to the payment of the amount of such purchase money into the Court of Chancery, under the circumstances and in the manner provided for by this act." The arbitrator found the value of the land at a certain sum, and directed it to be paid "within three days after," &c., following the words of the submission. The submission having been made a rule of court, and a rule having been obtained calling upon the company to show cause why they should not pay the sum of money (under 1 & 2 Vict. c. 110, s. 18); it was held, that assuming even that the arbitrator had exceeded his jurisdiction in ordering the money to be paid, the rest of the award was good, and that, as the award ascertained the amount of the purchase money, which the company, by their deed of submission, had agreed to pay, there was sufficient to enable the court to make an order on them to pay it. (*Lindsay v. Direct London and Portsmouth *Railw. Co.*, 1 Prac. Rep. 529; 19 L. J. Q. B. 417; [*268]

Order on
company to
pay money
awarded.

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c 18
Sect. 25.

15 Jur. 224.) It was held, also, that the payment of the money and the execution of the conveyance by L. were not dependent conditions, but that the payment was to precede the conveyance; and that it was therefore no answer to the present rule, that a conveyance had not been tendered. (*lb.*)

[268] It was held, also, that it was no objection that it was not shown that the company had taken possession of the land. (*lb.*)

A railway company by their special act were empowered to purchase land and enter upon and use the same for the purposes of the railway. But they were not, "except by the consent of the owner or occupier," to enter upon any such lands until they should have paid or deposited in the Bank of England the purchase money or compensation agreed or awarded to be paid for all interest in the same. The company, with the consent of the owner (the plaintiff), entered, in 1847, upon certain lands required for the purposes of the railway, the amount of compensation having been by an agreement between them referred to an arbitrator, who, in 1849, awarded a certain sum as compensation; no tender of a conveyance nor payment of the sum awarded had been made, and after the award, a demand of possession was served upon the company: it was held, that an action of ejectment could not be maintained against the company, the plaintiff's only right being to enforce the payment of compensation under the award. (*Doe d. Hudson v. Leeds and Bradford Railw. Co.*, 15 Jur. 946; 20 L. J. Q. B. 486.)

Liability of
company for
contingent
damage
caused by
works.

In an action on the case by the lessee of lands under W. C. against the defendants for constructing their railway across the lands of other persons without leaving sufficient opening for the passage of flood waters, whereby they were obstructed and penned up, and forced upon the lands of the plaintiff, the defendant pleaded that, before the plaintiff had anything in the lands now in his occupation, the defendants gave notice to W. C. to purchase lands of his adjoining to those now of the plaintiff, and that it was referred to an arbitrator to fix the amount of purchase money, and of compensation for injury

to the lands and other estates of W. C. by severance or otherwise, and to determine what bridges, arches, culverts, &c. should be made: it was held, that the compensation awarded under such reference related only to damage, known or contingent, by reason of the construction of the railway on the lands purchased of W. C., and to other damage arising from the construction of the railway at other places which was apparent and capable of being ascertained and estimated at the time when the compensation was awarded, and did not embrace also all contingent and possible damages which might arise afterwards by the works of the company at other places. (*Lawrence v. Great Northern Railw. Co.*, 15 Jur. 652; 20 L. J. Q. B. 293; 6 Railw. C. 656; 16 Q. B. 643.) (1)

(1) In 1845, a land owner received, under an arbitration, compensation for land, and "in respect of damages which might be sustained by reason of making a railway." Held, that he was not precluded from insisting on a further compensation for future unforeseen damages subsequently sustained. (*Lancashire and Yorkshire Railway Co. v. Evans*, 19 Eng. Law and Eq 295.

The owner of certain land required by a railway company, on being served with the usual notice stated his desire *to have the amount, to be paid to him for compensation and damages, settled by arbitration under the provisions of this act. Arbitrators were accordingly appointed by the landowner and the company, and these arbitrators not being able to agree upon an umpire, an umpire was ultimately appointed by the commissioners of railways. In the meantime, the company having paid into the bank the amount claimed by the landowner, and having given the bond required in such cases by the act, entered upon the land. The arbitrators not having made their award in time, the questions of compensation and damage came before the umpire, who made his award, giving the landowner a much less sum than that claimed by him from the company. The landowner having refused to deliver an abstract of title or to take any steps for con-

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veying the land, the company proceeded under the provisions of the act applicable to such a case and paid into the bank the sum awarded by the umpire. They then presented a petition for payment out to them of the sum paid in by them before taking possession of the land. The landowner in the meantime had taken proceedings at law to set aside the award on various grounds, but without success, and was at the time when the petition was presented prosecuting an action against the company to recover the amount originally claimed by him. Under these circumstances, the landowner opposed the petition of the company, but the Lord Chancellor made the order prayed, holding that the landowner was not entitled to avail himself of the security provided by the act in the deposit of the money, and at the same time to repudiate the proceeding, the benefit of the result of which it was the object of the act thus to secure him. (*Fooks, In re*, 2 Mac. & G. 357.)

A writ having issued in an action of debt against an incorporated railway company, the defendant's attorney consented to a judge's order referring to arbitration "the claims of the plaintiff in the action." The plaintiff claimed before the arbitrator a sum for extra work, occasioned by the defendant's breach of covenant in not giving the plaintiff possession of certain land at a stipulated time. The arbitrator entertained this claim, though objected to, and awarded the plaintiff a sum in respect of it. The court having refused to set aside the award, it was held, on motion, to enforce it under 1 & 2 Vict. c. 110, first, that if the matter in dispute were not within the jurisdiction of the arbitrator, the defendants should have applied to the court to revoke the submission; but not having done so, and the plaintiff having set up this matter as "a claim in the action," and the arbitrator having so decided in respect of it, his award was binding, however erroneous; secondly, that the submission was valid, though the attorney had no authority under seal to defend or refer the cause. (*Faviell v. Eastern Counties Railw. Co.*, 2 Exch. R. 344; 17 Law J. Exch. 223.)

XXVI. If, before the matters so referred shall be determined, any arbitrator appointed by either party *die, or become incapable, the party by whom such arbitrator was appointed may nominate and appoint in writing some other person to act in his place, and if, for the space of seven days after notice in writing from the other party for that purpose, he fail to do so, the remaining or other arbitrator may proceed *ex parte*; and every arbitrator so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death or disability as aforesaid.

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c. 18.

Sect. 26.

Vacancy of
arbitrator to
be supplied.

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XXVII. Where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint, by writing under their hands, an umpire to decide on any such matters on which they shall differ, or which shall be referred to him under the provisions of this or the special act, and if such umpire shall die, or become incapable to act, they shall forthwith after such death or incapacity appoint another umpire in his place, and the decision of every such umpire on the matters so referred to him shall be final.

Appointment
of umpire.

XXVIII. If in either of the cases aforesaid the said arbitrators shall refuse, or shall for seven days after request of either party to such arbitration, neglect to appoint an umpire the Board of Trade, in any case in which a railway company shall be one party to the arbitration, and two justices in any other case, shall, on the application of either party to such arbitration, appoint an umpire, and the decision of such umpire on the matters on which the arbitrators shall differ, or which shall be referred to him under this or the special act, shall be final (v.)

Board of
Trade em-
powered to
appoint an
umpire on
neglect of
the arbitra-
tors in case
of railway
companies.

(v.) A railway company and a landowner having agreed to settle by arbitration the amount of compensation to be paid to the latter for his land, each appointed an arbitrator, but the arbitrators not agreeing as to the appointment of an umpire, the company applied to the commissioners of railways to appoint one under this section, which they did by a document not under seal, and signed by a person not describing himself as secretary of the board. The umpire awarded a sum as compensation, but did not find whether it was greater

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or less than the sums offered by the company, and he awarded that the costs of the claimant should be paid according to the provisions of the Lands Clauses Consolidation Act. A rule having been obtained to set aside his award, on the grounds that the umpire was not legally appointed, and that he ought to have settled the costs of the claimant, the court refused to make the rule absolute, considering the objections too doubtful to determine on *motion. (*In re Wilts, Somerset and Weymouth Railw. Co. and Fooks*, 3 Exch. 728.)

A company appointed their arbitrator on the 23d of March 1847, and the claimant his on the 6th of April. These arbitrators did not appoint an umpire, or enter on the matters referred, and both parties, before the 29th of April, applied to the Board of Trade to appoint an umpire. On the 29th of April, the claimant objected to the appointment of any umpire not a barrister. The company afterwards made a request to the arbitrators, and, after seven days, another application to the Board of Trade under this section, who, on the 17th of May, appointed a surveyor to be the umpire. He made his award on the 23d of July. It was held, first, that the appointment of the umpire was valid, for it was not necessary that it should have been completed within the twenty-one days prescribed for the arbitrators by the 31st section. (*In re Bradshaw and East and West India Docks and Birmingham Junction Railw. Co.*, 12 Jur. 998; Law J. 1848, Q. B. 362; 12 Q. B. 562.)

In case of death of single arbitrator the matter to begin de novo.

XXIX. If, when a single arbitrator shall have been appointed, such arbitrator shall die or become incapable to act before he shall have made his award, the matters referred to him shall be determined by arbitration under the provisions of this or the special act, in the same manner as if such arbitrator had not been appointed.

If either arbitrator refuse to act the other to proceed ex parte.

XXX. If, where more than one arbitrator shall have been appointed, either of the arbitrators refuse or for seven days neglect to act, the other arbitrator may proceed *ex parte*, and the decision of such other arbitrator shall be as effectual as if he had been the single arbitrator appointed by both parties.

XXXI. If, where more than one arbitrator shall have been appointed, and where neither of them shall refuse or neglect to act as aforesaid, such arbitrators shall fail to make their award within twenty-one days after the day on which the last of such arbitrators shall have been appointed, or within such extended time (if any) as shall have been appointed for that purpose by both such arbitrators under their hands, the matters referred to them shall be determined by the umpire to be appointed as aforesaid.

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c. 18.

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If arbitrators fail to make their award within twenty-one days the matter to go to the umpire.

XXXII. The said arbitrators or their umpire may call for the production of any documents in the possession or power of either party which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose.

Power of arbitrators to call for books &c.

XXXIII. Before any arbitrator or umpire shall *enter into the consideration of any matters referred to him, he shall in the presence of a justice make and subscribe the following declaration, that is to say,

Arbitrator or umpire to make a declaration.

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‘ I A. B., do solemnly and sincerely declare, that I will
‘ faithfully and honestly, and to the best of my skill
‘ and ability, hear and determine the matters referred
‘ to me under the provisions of the act [*naming the*
‘ *special act.*]

A. B.

‘ Signed and subscribed in the presence of ———.’

And such declaration shall be annexed to the award when made; and if any arbitrator or umpire having made such declaration shall wilfully act contrary thereto he shall be guilty of a misdemeanor (*v*).

(*v*) On a reference to arbitration respecting the compensation to be paid to a landowner, the arbitrator and the umpire may make their declaration under this section before a justice of the peace of any county, and are not limited by the interpretation clause, *ante*, s. 3, p. 223, to make it before a justice of the peace of the county where the matter in dispute arose. (*Davies v. South Staffordshire Railw. Co.*, 21 Law J. Q. B. 97; M. C. 52; 15 Jur. 1133; 2 L. M. & P. 599.)

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c. 18.

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Costs of ar-
bitration how
to be borne.

XXXIV. All the costs of any such arbitration, and incident thereto, to be settled by arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions (*w*).

(*w*) It was decided that under this section the costs incident to the arbitration must be ascertained by the arbitrators, and included in their award, and could not be enforced under a subsequent certificate granted by such arbitrators. (*Re London and North Western Railw. Co. and Quick*, Law J. 1849, Q. B. 89; 5 Railw. C. 520.) But the last case has been overruled by the decision that such costs need not be incorporated in the award, but may be ascertained at a subsequent time by the persons who made the award. (*Gould v. Staffordshire Potteries Waterworks Co.*, 5 Exch. 214; 1 Pr. Rep. 264; 6 Railw. C. 568.)

Such adjudication of the costs need not be within three months after the time of reference. (*Ib.*)

The term "the arbitrators" in this section may mean either the arbitrators or umpire, according as the compensation shall have been determined by the arbitrators or umpire. (*Ib.*)

[*273] In an action for the recovery of compensation awarded *and the costs, the declaration stated that the umpire was required by the plaintiff to settle and determine the costs to be paid to him under that act: it was held on special demurrer that the averment amounted to a statement that the umpire was required to adjudicate upon the costs, and was sufficient. (*Ib.*)

If an undivided claim to compensation by a landowner, referred to arbitration under this act, be wholly disallowed by the arbitrators, the promoters of the undertaking to whom such claim was sent, although they made no offer in respect of such claim, are not of necessity by this section to bear the

costs of the arbitration, and the costs incident thereto; neither are they, under the like circumstances, to bear the like costs, the consequence of distinct claims similarly disallowed, though such claims were joined with others which are allowed. (*Reg v. Byron, re Mill v. Midland Railw. Co.*, 16 Jur. 640.)

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XXXV. The arbitrators shall deliver their award in writing to the promoters of the undertaking, and the said promoters shall retain the same, and shall forthwith, on demand, at their own expense, furnish a copy thereof to the other party to the arbitration, and shall at all times, on demand, produce the said award, and allow the same to be inspected or examined by such party or any person appointed by him for that purpose (x).

Award to be
delivered to
the pro-
motors of the
undertaking.

(x) A mandamus was granted to a railway company to take up an award of compensation for land required by the company, made by an umpire, and forthwith to furnish a copy to the owner. The return stated that the umpire had refused to deliver the award without payment of his fees and charges: it was held, that this section imposed upon the company the duty of taking up the award, and did not effect the arbitrator's right of lien, and therefore the return was bad. (*Reg. v. South Devon Railw. Co.*, 15 Jur. 464; 20 L. J. Q. B. 145; 15 Q. B. 1043 .)

XXXVI. The submission to any such arbitration may be made a rule of any of the superior courts, on the application of either of the parties (y).

Submission
may be made
a rule of
court.

(y) If a question of disputed compensation be submitted to arbitration under the 23d and 25th sections of this act, and an umpire be appointed under the 28th section by the Board of Trade, and the submission be made a rule of court under this section, the court has jurisdiction to set aside the award of the umpire, though neither the appointment of the umpire nor his award be made a rule of court. *In re Bradshaw*, 12 Q. B. 562.)

Where the owners of land, which was required by a rail-

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way company, had made an appointment of an arbitrator under this act, but refused to produce it for the purpose of *enabling the registrar to draw up an order which had been obtained by the company, making the submission a rule of court, the court refused a motion on behalf of the company that the order might be drawn up, or that the landowners might produce the appointment. (*In re Hawley*, 2 De G. & S. 33; 12 Jur. 389.) But there being in the landowners' affidavits in opposition to the motion, a statement that their arbitrator had been duly appointed, and there being a recital to that effect in the appointment of an umpire, the court, on a subsequent motion, ordered the submission to be made a rule of court, on that evidence of the appointment of the landowners' arbitrator. (*Ib.*) A., one of the parties to an award, had reason to believe that B., the opposite party, in whose hands the original submission was, was going to make it a rule of court, and B. in point of fact intended to do so, and was prevented by accident only. On the last day but one of the term next after the making of the award, A. obtained a rule *nisi* to set aside the award, and also a rule *nisi* for B. to file the submission with the master, in order to its being made a rule of court as of the day on which the motion to set aside the award was made, and that the rule to set aside the award should be drawn up on reading such rule; and the court on the following term made the rule absolute. (*Re Midland Railw. Co. and Heming*, 4 D. & L. 788.)

Award not
void through
error in form.

XXXVII. No award made with respect to any question referred to arbitration under the provisions of this or the special act shall be set aside for irregularity or error in matter of form.

Promoters of
the under-
taking to
give notice
before sum-
moning a
jury.

XXXVIII. Before the promoters of the undertaking shall issue their warrant of summoning a jury for settling any case of disputed compensation, they shall give not less than ten days' notice to the other party of their intention to cause such jury to be summoned, and in such notice the promoters of the undertaking shall state what sum of money they are willing to give for the interest in such lands sought

to be purchased by them from such party, and for the damage to be sustained by him by the execution of the works (z).

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c. 18
Sect. 38.

(z) The provisions of this section requiring the company to give notice of the amount of compensation they are willing to pay the claimant before they summon a jury to settle the same, and also the provisions of the 51st section, which regulates by whom the costs of such inquiry are to be borne, apply to cases where the company are desired by the claimant under the 68th section, to issue their warrant for summoning such jury. (*Richardson v. South Eastern Railw. Co.*, 2 Prac. Rep. 409; 15 Jur. 660; 20 L. J. C. P. 336; 11 C. B. 154.)

Affirmed on error in the Exchequer Chamber. (16 Jur. 151.)

*Therefore where a jury has been summoned in compliance with a notice from the claimant, under the 68th section, if the verdict of the jury is for a greater sum than a sum previously offered by the company, the claimant is entitled to his costs of such inquiry. (*Ib.*)

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This section applies only to cases where the promoters of an undertaking, are about to take or injuriously affect, land in the possession of the claimant, and in such case they are bound to give the claimant ten days' notice of their intention to cause a jury to be summoned to assess compensation; but such notice is not required where the promoters have already taken possession of, or injuriously affected, land, but, for which no compensation has been made; such a case is regulated by section 68; and if the claimant desires the question to be settled by a jury, and states the amount which he claims, the promoters are bound to pay the whole amount so claimed, or to issue their warrant for summoning a jury within twenty-one days. (*Raildane v. York, Newcastle and Berwick Railw. Co.*, 14 Jur. 1021; 19 L. J. Q. B. 464; 15 Q. B. 404.)

XXXIX. In every case in which any such question of disputed compensation shall be required to be determined by jury

Warrant for
summoning
jury to be ad-

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c. 18.

Sec 39.
dressed to the
sheriff.

the verdict of a jury, the promoters of the undertaking shall issue their warrant to the sheriff (a) requiring him to summon a jury for that purpose, and such warrant shall be under the common seal of the promoters of the undertaking if they be a corporation; or if they be not a corporation, under the hands and seals of such promoters or any two of them; and if such sheriff be interested in the matter in dispute, such application shall be made to some coroner of the county in which the lands in question, or some part thereof, shall be situate; and if the coroners of such county be so interested, such application may be made to some person having filled the office of sheriff or coroner in such county, and who shall be then living there, and who shall not be interested in the matter in dispute; and with respect to the persons last mentioned, preference shall be given to one who shall have most recently served either of the said offices; and every ex-sheriff, coroner, or ex-corer, shall have power if he think fit, to appoint a deputy or assessor (b).

(a) The promoters of a railway company may properly issue their warrant to the sheriff to summon a compensation jury, though the under-sheriff be interested as a shareholder in the company. The interpretation clause, sect. 3, does not in such case, incorporate the word "under-sheriff" into the word "sheriff," as used in this section. (*Worsley v. South Devon Railw. Co.*, 15 Jur. 970; 20 L. J. Q. B. 254; 16 Q. B. 539.)

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*In such a case, the sheriff should either take the inquisition in person or appoint some disinterested party. (*Ib.*)

The direction in this section, in respect of the interest of the sheriff, is introduced for the protection of the party against whom the interest would operate, and therefore he may waive the protection if he so elects. A railway company having issued their warrant to the sheriff to summon a jury to assess compensation under this section, the under-sheriff before whom the inquisition was to be taken, informed the party whose lands was to be assessed, that he, the under-sheriff, was a shareholder in the railway company. It was

held, that as the party did not object, but proceeded with the inquisition before the under-sheriff, he must be taken to have waived any objection arising from the interest of the under-sheriff under the statute. (*Ex parte Baddeley*, 5 Dowl. & L. 575; 5 Railw. C. 542.)

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c. 18.
Sect. 39.

(b) A local drainage act created the lords or ladies of three manors, or in his or their absence, their agents appointed in writing under their hands, commissioners for executing the act. The act authorized the commissioner to take lands for the purposes of the drainage, and contained clauses for that purpose to the same effect as those contained in this act subsequently passed. The three lords of the manors, by writing under their hands respectively, appointed the defendants their agents. The defendants acted as commissioners, and required to take, for the purposes of the act, 3 acres, 1 rood, 25 perches of the plaintiff's land. They gave plaintiff a notice in writing, describing by metes and bounds the specific acres, roods and perches required, and containing every particular required by the act in such a notice. The plaintiff refused to treat; and the commissioners thereupon issued a warrant to the sheriff of the county to summon the jury to assess the sum to be paid to the plaintiff for the purchase of 3 acres, 1 rood, 25 perches of land required for the purposes of the act, but the warrant did not recite or refer to the notice, and did not describe specifically which 3 acres, 1 rood, 25 perches were required. The plaintiff had 200 acres of land in the district. Both the notice and warrant were in the defendants' names as commissioners. A jury were empanelled, and assessed the price of 3 acres, 1 rood, 25 perches pointed out to them, which were in fact the same land specifically described in the notice. An inquisition was drawn up, reciting the warrant but not the notice, and not showing specifically in respect of which 3 acres, 1 rood, 25 perches of the plaintiff's land the price was assessed. The plaintiff, who had throughout protested against the proceedings, refused to receive the price so assessed. The defendants paid the price into the bank (under a section in the local act enabling them

Notice re-
quiring
lands : juris-
diction 'o
take inquisi-
tion.

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Sect. 39.

so to do), and entered on the land. The plaintiff having brought an action against them for so doing, it was held first, that the defendants, by the above mentioned appointment, were themselves commissioners under the local act, and not mere agents of the lords of the manors, and that the notice and warrant were properly issued in the defendants' own names. (*Ostler v. Cooke*, 13 Q. B. 143; 18 Law. J. Q. B. 185; 13 Jur. 583; affirmed in error, 22 L. J. Q. B. 71.) It was held secondly, that the statutable title of the defendants to the land was made out, and that the warrant and inquisition were good, as they showed everything which by the act of parliament was cognizable by the sheriff and inquest, and it was sufficient that in fact there was a notice; that in fact the land described in it was the same as that shown to the jury, and that in fact the parties did not agree, those being matters into which the sheriff and jury could not inquire, and which therefore it was not necessary to mention in the warrant or inquisition. (*Ib.*)

Mandamus
to company
to issue pre-
cept for sum-
moning jury

Where proceedings by arbitration under the 23d and subsequent sections of this act have proved abortive in consequence of the non-appointment of an umpire within the time limited by the statute, the owner of the land is not bound to proceed anew under the 68th section; but in the event of a refusal by the company is entitled to a mandamus to compel them to issue their warrant to summon a jury to assess compensation. (*In re South Yorkshire, Doncaster, and Goole Railw. Co., Ex parte Senior*, 7 D. & L. 36; 14 Jur. 1093.)

In such a case, a neglect to issue the warrant after a demand made upon the solicitors of the company, is a sufficient refusal to entitle the claimant to the writ. (*Ib.*)

Where a railway company had given notice of their requiring part of certain premises, and a mandamus had been obtained, commanding the company to issue their precept for summoning a jury to assess compensation for the whole, the writ cannot go for part. (*Reg. v. London and South Western Railw. Co.*, 12 Jur. 973; Law J. 1848, Q. B. 326.)

The South Wales Railway Company having power to

cross the L. Railway, included in their deposited plans and book of reference certain lands on which the L. Railway was constructed, and gave notice to the L. Company that they required to purchase such lands for the purposes of their railway. The South Wales Railway Company had no power to purchase, nor had the L. Company power to sell, any part of their actual line: it was held, that a mandamus could not be sustained, requiring the South Wales Railway Company to issue their warrant to the sheriff to summon a jury to assess compensation for the purchase of the land on which the L. line was constructed; since neither one party could by law sell nor the other purchase the land in question. (*Reg. v. South Wales Railw. Co.*, 6 Railw. Cas. 489; 14 Jur. 828; 19 Law J. Q. B. 272; 14 Jur. 828.)

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c. 18.
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Where within the prescribed period the promoters of a railway company gave notice to a landowner on the intended line of railway that they required to purchase his lands, and the landowner served them with a notice to treat, and demanded that the amount of compensation should be settled by a jury, and no further steps were taken to complete the purchase until after the expiration of the period prescribed for the exercise of the powers of the company for the compulsory *purchase and taking of lands; it was held, on error in the Exchequer Chamber, that the company might, on the application of the landowner, notwithstanding the lapse of time, be compelled by mandamus to issue their warrant to the sheriff to summon a jury to assess the amount of compensation. (*Birmingham and Oxford Junction Railw. Co. v. Reg.* (in error), 15 Q. B. 634; 20 L. J. Q. B. 304.—Exch. Cham.)

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Where a railway company is called upon by a landowner over whose land their line is authorised to be made but to whom no notice requiring his land has been given to proceed to complete their railway, and to purchase the land necessary for the purpose, it is no answer to a rule for a mandamus for that purpose that the period prescribed for the exercise of the powers of compulsory purchase of the company has nearly expired, unless it is also shown that it is impossible for them

8 & 9 Vict. c. 18. to take the initiatory steps towards purchasing the land in
 Sect. 39. question. (*Reg. v. York, Newcastle and Berwick Railw. Co.*, 20 L. J. Q. B. 513 ; 6 Railw. C. 648.)

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The Commissioners of Woods and Forests gave notices, under stat. 9 & 10 Vict. c. 38, s. 15, that they intended to take lands specified in the schedule to that act, for the purpose of forming Battersea Park. One of the landowners obtained a mandamus to the commissioners to cause a jury to be summoned, under section 23, to assess compensation for his land. On return stating the proceedings at length (and showing that the defendants in pursuance of the act, and on behalf of the crown, gave the notices in order to ascertain whether the lands could be purchased for the sum limited by section 1, which by the claims sent in it appeared they could not), and demurrer to such return; it was held, that the commissioners under the statute were acting in a public capacity, and that the notice given by them did not constitute a quasi contract enforceable by mandamus. (*Reg. v. Woods and Forests (Commissioners)*, 15 Jur. 35 ; 15 Q. B. 761.)

An application was made for a mandamus to a railway company, to summon a jury to assess the amount of the purchase money of land taken by the company, and also the compensation for damage done, and to be done, by the works of the company. By mistake the rule was drawn up and made absolute for a mandamus to assess the amount of the purchase money only. The prosecutor issued a writ, corresponding with his application; which writ was quashed, on the ground that it did not follow the rule. An application was then made to amend the rule for the mandamus, but was refused; it was held, that an application might be made for another mandamus, upon the same affidavits as were used in the original application. (*Reg. v. East Lancashire Railw. Co.*, 11 Jur. 169 ; Law J. 1847, Q. B. 127.)

Sheriff interested.

Where the company issue the warrant, it is very reasonable, as they must know beforehand from their own books whether the sheriff is a shareholder or not, that they should not be allowed to send such warrant to one of their

own body, and thereby in effect constitute one of the individuals *of whom the company is composed, and who may be presumed to be interested in their favor, to be a judge in their own behalf. It was questioned whether an enactment of this kind would apply in a case where, as in *Middlesex*, the office of sheriff is constituted of two persons, and where only one of such persons was a shareholder in the company. (*Corrigal v. London and Blackwall Railw. Co.*, 5 Man. & G. 219; 6 Scott, N. R. 241; 3 Railw. C. 411.)

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Where there are two distinct sheriffs, and one is interested in the subject matter of an action, the process may be directed to the other, and ought not to go to the coroner. (*Letsom v. Bickley*, 5 Mau. & S. 144; *Rex v. Warrington*, Salk. 152; 4 Mod. 65; *Rich v. Player*, 2 Show. 262, 286.)

By a railway act it is enacted, that if any person interested in lands affected by the execution of the act shall not agree with the company as to the amount of purchase money or compensation, &c., and shall request that the matter in dispute may be submitted to the determination of a jury, the company shall issue a warrant to the sheriff or sheriffs of the county or city where the lands in question shall be situate, &c., and if such sheriff or sheriffs shall be a shareholder or shareholders in the company, *then to any of the coroners* of the said county, &c., commanding such sheriff, &c., to impanel a jury, who are to inquire and assess, &c. It was questioned whether the enactment would apply in a case where, as in *Middlesex*, the office of sheriff is constituted of two persons, and where one only of such persons is a shareholder in the company. By a subsequent act extending the line of a railway, it is enacted, that in case of dispute between the company and parties claiming compensation, wherein the company do not upon request, &c., within twenty-one days issue their warrant to the sheriff or sheriffs of the county or city where, &c., it shall be lawful for the party so having given notice himself to send a request in writing to the sheriff, &c., according to the tenor of the

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Sect 39. former act; and the sheriff, &c., shall thereupon empanel a jury, &c. It was held, that the former enactment did not apply in a case where a party proceeded under the latter act, so as to render void the proceedings held before the sheriff; the former enactment being confined to cases where the company themselves issued their warrant, which they were not to direct to one of their own shareholders, and the latter embracing cases in which, the company having neglected to issue the warrant, the party in dispute with them might call upon the sheriff to hold an inquisition, as such party would have no means of knowing whether or not the sheriff was a shareholder. It was questioned whether such proceedings would have been avoidable if objected to at the proper time. But it was held, that where the company appeared by their counsel before the sheriff and jury at the holding of the inquisition without objection, they had waived any such subjection. (*Corrigal v. London and Blackwall Railw. Co.*, 5 Man. & G. 220; 6 Scott, N. R. 241; 3 Railw. C. 411; see *Letsom v. Bickley*. 5 Man. & S. 144.)

The precept must be consistent with the notice.

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*A railway company have no power to summon a jury to assess the value of lands as to which they have given no previous notice to treat. When a company empowered by parliament has given notice to an owner of land to treat for the purchase of part of it, but the owner and the company cannot agree upon the terms, and the company therefore issues a precept to the sheriff to summon a jury to assess the value, the part of the land which is described in the precept as being that of which the jury are to assess the value, must be neither more nor less than that for the purchase of which the owner has already been required by the notice to treat. (*Stone v. Commercial Railw. Co.*, 4 My. & Cr. 122; 1 Railw. C. 375; 3 Jur. 946.) Lord *Cottenham*, C., said, if he were to hold that the company might exclude from the consideration of the jury part of that which was comprised in the notice, it would be in the power of the company, after having given notice to take particular property, to subdi-

vide that property into as many subjects of inquiry before the jury as they might think fit. He found no authority to subdivide the contract, and that without any notice to the party, who has no means of knowing what it is which is to be the subject of inquiry before the jury. If the company could do that they would not be bound to complete their contract; and when the parties came before the jury, the owner might be told that it was not the intention of the company to take the opinion of the jury upon the value of what was comprised in the notice, but upon the value of a small part of it only; for if they are not bound by the notice, they may take the jury's opinion upon any part of the land, without any intimation to the owner as to what part that is to be. The proceeding before the jury must be consistent with the precept, and the precept must be consistent with the notice. (*Stone v. Commercial Railw. Co.*, 4 My. & Cr. 122, see pp. 234, 235; 1 Railw. C. 375.)

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A variation in the description of lands, in the notice to treat and in the precept to the sheriff, is an irregularity merely, and is waived by appearing before the jury summoned to assess compensation, and by proceeding on the trial after the objection taken and overruled. (*Ex parte Bailey*, 1 L. & M. Bail. Ct. Cas. 66.)

A *mandamus* was granted to the sheriff to execute a precept for assessing compensation, sufficiently correct to have been acted on, although the requisition did not properly follow the original demand, nor state correctly the purpose for which the jury should be summoned. (*Walker v. Blackwall Railw. Co.*, 3 Q. B. R. 744; Law. J. 1843, Q. B. 88; 3 Gale. & D. 549; see *ante*, p. 238.)

A railway act directed that in certain cases the railway company should issue a precept to the sheriff to summon a jury to assess damages, and that the verdict and judgment thereon should be "final and conclusive." A judgment having been entered up under that act, the court refused to grant a *mandamus* to the company to issue another precept,

New trial
refused.

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though the under-sheriff had excluded one ground of damages *which ought to have been submitted to the jury; and the jury had also found a verdict against the evidence, proving that a greater amount of damages had been sustained than the jury gave their verdict for. (*Reg. v. Eastern Counties Railw. Co.*, Law J. 1843, p. 271, Q. B.; 2 Dowl. N. S. 945; 7 Jur. 628; 3 Railw C. 466. See *post*, 288 n (g).

Provisions
applicable to
sheriff to ap-
ply to coro-
ner.

XL. Throughout the enactments contained in this act relating to the reference to a jury, where the term "sheriff" is used, the provisions applicable thereto shall be held to apply to every coroner or other person lawfully acting in his place (b); and in every case in which any such warrant shall have been directed to any other person than the sheriff, such sheriff shall, immediately on receiving notice of the delivery of the warrant, deliver over on application for that purpose, to the person to whom the same shall have been directed, or to any person appointed by him to receive the same, the jurors book and special jurors list belonging to the county where the lands in question shall be situate.

Deputy cor-
oner.

(b) The coroner of any county, city, riding, liberty or division, may, by writing under his hand and seal, appoint a fit and proper person, subject to the Lord Chancellor's approval, to act for him as his deputy in the holding of inquests, and all inquests taken and other acts performed by any such deputy coroner, under such appointment shall be deemed to all intents and purposes to be the acts and deeds of the coroner by whom such appointment was made. A duplicate of the appointment is to be transmitted to the clerk of the peace. No such deputy shall act for any coroner except during the illness of the coroner, or during his absence from any lawful or reasonable cause. Such appointment may at any time be revoked by the coroner by whom the same was made. (6 & 7 Vict. c. 83, s. 1.) Under this section the coroner being engaged upon another inquisition, is a sufficient cause of absence, although in fact he may be present during part of the inquiry. (*Reg. v. Perkins*, 9 Jur. 686.) An inquisition was held good which commenced

as follows: "An inquisition, &c. before R. D., one of the coroners, &c., and concluded in witness, &c. R. D. coroner, by E. M. his deputy." (See Com. Dig. Attorney (C. 14). 8 & 9 Vict.
c. 18
Sect. 41)

Every coroner for any county or any district thereof, or his deputy, assigned by 7 & 8 Vict. c. 92, except during the illness, incapacity or unavoidable absence of any coroner for any other district, or a vacancy in the office of a coroner for any other district, may *hold inquest only within his own district*. The coroner holding any inquest out of his own district shall in his inquisition certify the cause of his holding such inquest, which certificate is made conclusive evidence of the illness or incapacity or unavoidable absence of the coroner for whom he attends, or of the vacancy of the office. (7 & 8 Vict. c. 92, s. 20.) Where any writ shall be directed *to and executed by any coroner in the place of the sheriff, such coroner is entitled to receive the same compensation for executing the same as the sheriff would have been. (7 & 8 Vict. c. 92, s. 22.)

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XLI. Upon the receipt of such warrant the sheriff shall summon a jury of twenty-four indifferent persons, duly qualified to act as common jurymen in the superior courts, to meet at a convenient time and place to be appointed by him for that purpose such time not being less than fourteen and not more than twenty-one days after the receipt of such warrant, and such place not being more than eight miles distant from the lands in question, unless by consent of the parties interested, and he shall forthwith give notice to the promoters of the works of the time and place so appointed by him (c). Jury to be
summoned.

(c) The case before the jury must be consistent with the precept, and the precept must be consistent with the notice. (*Stone v. Commercial Railw. Co.*, 1 Railw. C. 375; 4 My. & Cr. 122; *ante* p. 279.)

XLII. Out of the jurors appearing upon such summons a jury of twelve persons shall be drawn by the sheriff, in such manner as juries for trials of issues joined in the superior courts are by law required to be drawn, and if a sufficient number of jurymen do not appear in obedience to such sum-

Jury to be
empanelled

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c 18.
Sect. 43.

mons the sheriff shall return other indifferent men, duly qualified as aforesaid, the bystanders, or others that can speedily be procured, to make up the jury aforesaid; and all parties concerned may have their lawful challenge against any of the jurymen, but no such party shall challenge the array.

Sheriff to
preside, wit-
nesses to be
summoned.

XLIII. The sheriff shall preside on the said inquiry, and the party claiming compensation shall be deemed the plaintiff, and shall have all such rights and privileges as the plaintiff is entitled to in the trial of actions at law (*d*); and if either party so request in writing, the sheriff shall summon before him any person considered necessary to be examined as a witness touching the matters in question, and on the like request the sheriff shall order the jury, or any six or more of them, to view the place or matter in the controversy, in like manner as views may be had in the trial of actions in the superior courts.

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(*d*) These words in a railway act, that the party claiming compensation shall be "deemed to be plaintiff, and entitled to the same rights and privileges as plaintiffs in actions at *law," were held to be intended only to regulate the general course of proceedings,—to remove doubts concerning the right to begin, and to show in other respects how the inquisition should be conducted. (*Rex v. Gardener*, 6 Ad. & E. 117. See *Reg. v. Sheriff of Warwickshire*, 2 Railw. C. 661.)

Penalty on
sheriff and
jury for de-
fault.

XLIV. If the sheriff make default in any of the matters hereinbefore required to be done by him in relation to any such trial or inquiry, he shall forfeit fifty pounds for every such offence, and such penalty shall be recoverable by the promoters of the undertaking by action in any of the superior courts; and if any person summoned and returned upon any jury under this or the special act, whether common or special, do not appear, or if appearing, he refuse to make oath, or in any other manner unlawfully neglect his duty, he shall, unless he show reasonable excuse to the satisfaction of the sheriff, forfeit a sum not exceeding ten pounds, and every such penalty payable by a sheriff or jurymen shall be applied in satisfaction of the costs of the inquiry, so far as the

same will extend, and in addition to the penalty hereby imposed, every such jurymen shall be subject to the same regulations, pains and penalties as if such jury had been returned for the trial of an issue joined in any of the superior courts.

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c. 18.
Sect. 45.

XLV. If any person duly summoned to give evidence upon any such inquiry, and to whom a tender of his reasonable expenses shall have been made, fail to appear at the time and place specified in the summons without sufficient cause, or if any person, whether summoned or not, who shall appear as a witness refuse to be examined on oath touching the subject matter in question, every person so offending shall forfeit to the party aggrieved a sum not exceeding ten pounds.

Penalty on
witnesses
making de-
fault.

XLVI. Not less than ten days notice of the time and place of the inquiry shall be given in writing by the promoters of the undertaking to the other party.

Notice of
inquiry.

XLVII. If the party claiming compensation shall not appear at the time appointed for the inquiry, such inquiry shall not be further proceeded in, but the compensation to be paid shall be such as shall be ascertained by a surveyor appointed by two justices in manner hereinafter provided (e).

If the party
make default
the inquiry
not to pro-
ceed.

(e) See 8 & 9 Vict. c. 18, ss. 59, 60.

XLVIII. Before the jury proceed to inquire of and *assess the compensation or damage in respect of which their verdict is to be given, they shall make oath that they will truly and faithfully inquire of and assess such compensation or damage, and the sheriff shall administer such oaths, as well as the oaths of all persons called upon to give evidence.

Jury to be
sworn.
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XLIX. Where such inquiry shall relate to the value of lands to be purchased, and also to compensation claimed for injury done or to be done to the lands held therewith, the jury shall deliver their verdict separately for the sum of money to be paid for the purchase of the lands required for the works or of any interest therein belonging to the party with whom the question of disputed compensation shall have arisen, or which, under the provisions herein contained, he is enabled to sell or convey, and for the sum of money to be paid by way of compensation for the damage, if any, to be sustained by the owner of the lands by reason of the sever-

Sums to be
paid for pur-
chase of lands
and for dam-
age, to be as-
sessed sepa-
rately.

8 & 9 Vict.

c. 18.

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Cases as to
separate as-
sessments
for value of
lands and in-
jury thereto.

ing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise of the powers of this or the special act, or any act incorporated therewith (*f*).

(*f*) See section 63 of this act, *post*. In cases where the statute has provided that the jury shall assess and give a verdict for the sum to be paid for the purchase of lands, and also the sum to be paid by way of satisfaction, recompence or compensation for goodwill, &c. and also "that the satisfaction, recompence or compensation for such damage or loss, shall be inquired into and *assessed separately* and distinctly from the value of the land so to be taken or used as aforesaid;" such words have been held not to be compulsory, so that, if they are not observed, the inquisition and subsequent judgment are void, but as *directory* only; so that the company or claimant might have called upon the sheriff to keep the evidence distinct as to the value of the premises and the satisfaction for damage, and to find and adjudicate a separate sum in respect of each. (*Corrigal v. London and Blackwall Railw. Co.*, 5 Man. & G. 219, 248; 2 Dowl. N. S. 851; 6 Scott, N. R. 241; 3 Railw. C. 411; *In re London and Greenwich Railw. Co.*, 2 Ad. & E. 678; 4 N. & M. 458. As to where statutes are directory, see *ante*, pp. 72—75.)

By a railway act it was enacted, that for settling differences between the company and owners of land, the company should issue a warrant commanding the sheriff, to empanel &c., a jury, which jury should "inquire of, assess and give a verdict for the sum of money to be paid by way of satisfaction or compensation for the damages sustained" from the company's acts. The company issued their warrant to the sheriff, commanding him to empanel a jury for the purpose of "inquiring of, assessing and giving a verdict for the sum of money (if any) to be paid to C. by way of satisfaction or compensation for the damages (if any) which shall have been done, &c." The jury on the inquisition, in pursuance of this warrant, found that C. "had not sustained any" damage; therefore it was considered that no damages or sum of money be as-

sessed, &c. It was held, first, that the jury, even though the words "if any" had not been in the warrant, would still have been authorized to find that there was no damage, and consequently that the words in the warrant did not vary the duty imposed upon the jury or prevent the warrant from being in pursuance of the act. (*Reg. v. Lancaster and Preston Junction Railw. Co.*, 6 Q. B. 759; 3 Railw. C. 725.)

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The Hull Dock Company's Act (7 & 8 Vict. c. ciii.), giving them power to take certain lands, provided for the payment of purchase money, and enabled the owners of lands or interested therein to accept compensation for any damage by them sustained, by reason of severing of such lands or otherwise, owing to the exercise of the powers of that act. Similar language as to compensation was used in other clauses. In default of agreement between the company and landowners, the purchase money and compensation were to be assessed by a jury, who by section 117, were to deliver their verdict for the sum to be paid for purchase and also the sum to be paid for the injury done to the lands of any such party by the severance of such lands from those required by the company; and also the sum to be paid by way of compensation for the damage occasioned to any such lands by the execution of the works, whether for damage sustained before the time of the inquiry or for future damage, either temporary or permanent, or for any recurring damages, &c.; and the sums to be paid for the injury done by any such severance as aforesaid, or by way of compensation for any such damages as aforesaid, were in every case to be assessed separately from the value of the lands, &c., or the sum to be paid for the purchase thereof, &c., it was held that the words of section 117 were large enough to include compensation to a landowner parting with his premises, for loss which he would sustain by having to give up his business as a brewer until he could obtain other suitable premises for carrying it on; and that a verdict awarding, first, a sum for purchase money, and, secondly, a further sum as compensation for such loss, was warranted by the act. (*Jubb v. Hull Dock Co.*, 9 Q. B., 443.) It seems that if the latter

Compensation for injury to trade.

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c 18.
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part of the finding has been void for want of jurisdiction, the inquisition might have been removed by certiorari, though the act contained a clause taking away certiorari; and the verdict as to the award of purchase money was good. (*Ib.* See *Reg. v. London and North Western Railw. Co.*, 6 Railw. C. 551.)

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A railway company gave notice to B. G. and D. trading in co-partnership, of their intention to take certain premises occupied by them, for the purposes of the railway, under the power of the act of parliament constituting the company, *which was incorporated with this act. A mandamus having been granted to the company, commanding them to issue their precept for summoning a jury to assess the amount of compensation to be paid to B. G. and D., the court refused to quash the writ of mandamus, although it was alledged to have been obtained without the knowledge or assent of D., one of the co-partners, but left the defendants to make a return of the facts, if they should think fit. (*Reg. v. London and South Western Railw. Co.*, 13 Jur. 10.)

Separate assessments dispensed with.

A company was empowered by statute to take certain lands, making compensation to the owners for the value of the lands, and for damage occasioned by the taking; and it was enacted that such compensation, in case of disagreement, should be assessed by a jury to be summoned by the sheriff on the company's warrant. It was also enacted, that upon such assessment the satisfaction for damages should be settled and ascertained separately from the value of the lands. A jury was summoned on a warrant in pursuance of the act, stating the subject of the inquiry to be the purchase money to be paid for lands of J. K., and the compensation to be made to him for damages. The jury returned a general verdict for 15,000*l.* Neither the proprietor nor the company (unless by the form of the warrant) required a distinct assessment to be made of value and damages. The court refused to grant a mandamus to the sheriff, at the company's instance, to summon a jury for a new inquiry; it being objected that, for want of a distinct assessment, the *ad valorem* duty to be put upon the conveyance

to the company could not be ascertained, the court recommended that the finding of the jury should be specially stated in the conveyance, and duty paid as upon the purchase for 15,000*l*. (*In re London and Greenwich Railw. Co.*, 2 Ad. & E. 678; 4 N. & M. 458.)

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c. 18.
Sect. 49.

By a railway act it is enacted, that the jury shall inquire, &c., and give a verdict for the sum to be paid for the purchase of lands, and also the sum to be paid by way of satisfaction, &c., for goodwill, &c., and that such satisfaction should be inquired into and assessed separately and distinctly from the value of the lands. By a subsequent act it is further enacted, that in case any dwelling house, &c., within fifty-feet from the railway, shall be deteriorated in value, and the owners &c., shall require the company to purchase the same, the company shall treat for the purchase and for the compensation, &c., for any loss, &c., in respect of any tenant's fixtures, &c.; and in case the parties cannot agree as to the value of such dwelling-house, &c., or as to the amount of such compensation, &c., then the amount shall be ascertained by the verdict of a jury in the manner described in the former act, &c., provided that no party shall be entitled to receive compensation unless the jury shall by their verdict determine that the property has been deteriorated in value by the construction of the railway. The plaintiff, in an action upon the judgment founded upon an inquisition to recover under the last mentioned section, the purchase money of a house, and compensation for tenant's fixtures, &c., stated that the jury gave a verdict for 250*l*. "for the purchase of the house, also by way of satisfaction, &c. for all damages in respect of the tenant's fixtures." The defendant pleaded that the plaintiff adduced evidence at the inquisition, "not only of the loss and damage in respect of goodwill, tenant's fixtures &c., but also of certain loss and damage in respect of the dwelling house, by reason of the construction of the railway; that the jurors did assess and give a verdict for the sum of 250*l*. for the purchase of the dwelling house, and also by way of satisfaction, &c., for the several losses &c., in the plea mentioned, whereby the in-

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quisition, verdict and judgment were void; it was held that the mere fact of the plaintiffs adducing such evidence, and the receiving thereof by the sheriff, did not effect the validity of the verdict, as such evidence might have been given to show that the house had been deteriorated, which was necessary to give jurisdiction to the sheriff and jury. It was held also that the verdict, as stated in the declaration, excluded the possibility of any damages being given for the deterioration of the house by the construction of the railway. It was held, also, that the enactment in the first act as to separate assessments was directory only, and not in the nature of a condition. (*Corrigal v. London and Blackwall Railw. Co.* 5 Man. & G. 220; 2 Dowl. N. S. 551; 6 Scott, N. R. 241 3 Railw. Ca. 411.)

Compensation for particular interests.

A canal company were empowered by act of parliament to agree for the purchase of lands, &c., and tenants for life, &c., and owners and occupiers of lands through which the works were to pass, were to receive satisfaction for the value of the lands and for the damages sustained in making the works, the amount to be settled, if necessary, by a compensation jury, who were to assess purchase money or compensation, and to settle what shares should be allowed to any tenant or person having a particular interest. The jury having assessed a compensation to a tenant for life for damage to his property, without noticing the interest of any other person, the court would not presume, in the absence of any affidavit, that they had given compensation for a larger interest than the tenant for life had, or had overlooked any other person's interest. (*Rex v. Nottingham Old Water Works*, 6 Ad. & E. 355; 5 Nev. & M. 498.)

The trustees of a turnpike road, under a local act, claiming to take certain premises on paying compensation to the parties interested, served a notice on a person, containing an offer of a sum as compensation for his undivided third part in a term in the premises, with a warning that, in default of his acceptance, a jury would be summoned to assess compensation. They afterwards served him with a second notice,

directed to him and several other parties interested in the premises, that, in pursuance of the local act, a jury would be sworn to assess the sums to be paid to the parties for their respective interests. Notices similar to the first were served on the other persons named in the second notice. The jury were summoned, and sworn to assess the sums to *be paid for the respective estates, but found only the gross value of the premises; and the inquisition stated that the jury found that sum to be the value to be paid to the parties for their estates, "according to their respective proportions therein," without apportioning it. It appeared by affidavit that some of the parties were bare trustees. The court considered the inquisition was bad for not apportioning the value among the parties who had separate interests; and also, it seems, for not setting out that the several parties had been served with notices to treat, although the fact appeared by affidavit. (*Rex v. Trustees of Norwich and Watton Road*, 5 Ad. & E. 563; 1 Nev. & P. 32; see *Rex v. Bagshaw*, 7 T. R. 363; see note to section 50, *post*.)

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L. The sheriff before whom such inquiry shall be held shall give judgment for the purchase money or compensation assessed by such jury, and the verdict and judgment shall be signed by the sheriff, and being so signed shall be kept by the clerk of the peace among the records of the general or quarter sessions of the county in which the lands or any part thereof shall be situate in respect of which such purchase money or compensation shall have been awarded; and such verdicts and judgments shall be deemed records, and the same or true copies thereof shall be good evidence in all courts and elsewhere, and all persons may inspect the said verdicts and judgments, and may have copies thereof or extracts therefrom, in paying for each inspection thereof one shilling, and for every one hundred words copied or extracted therefrom, sixpence; which copies or extracts the clerk of the peace is hereby required to make out, and to sign and certify the same to be true copies (*g*.)

Verdict and
judgment to
be recorded.

(*g*) It is to be observed, that, according to the case of *Reg. v. Eastern Counties Railw Co.* (3 Railw. C. 464, *ante*, p. 281), there is no remedy for a misdirection by the sheriff, or

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improper rejection of evidence, on the ground that the verdict is against evidence, or that the compensation assessed is grossly insufficient. But it is to be observed, that the act under which this decision was made, declared that the verdict and judgment should be "binding and conclusive," which words are omitted in this act.

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By stat. 9 & 10 Vict. c. 38, authorizing the Commissioners of Woods and Forests to form a royal park in Battersea Fields, in Surrey, the commissioners are empowered to take lands for the purpose of the act, and in case of disagreement with the landowners, the value is to be assessed by a jury before the sheriff of the country. By sect. 23, after the jury have ascertained the amount, the sheriff "shall thereupon order the sum to be paid by the commissioners to the landowner," the "verdict or inquisition and order" to be "final, binding, and conclusive." By section 30, the judgments and verdicts are to be entered in the office of land revenue records and enrolments, and to be afterwards deposited with the clerk of the peace, and to be deemed records. By sect. 40, if after assessment the landowner refuse to convey, then, on payment of the sum assessed into the Bank of England, to the use of the landowner, the land is thenceforth to vest in the Queen, as part of her possessions in right of the crown. Declaration in prohibition alleged that upon an inquisition taken before the sheriff on a disagreement between the plaintiff and the commissioners as to the price to be paid him for land required for the purposes of the act, the sheriff had directed the jury to exclude from their valuation all of the land to which the plaintiff's title could be impeached, and had thereby misdirected them as to the proper mode of estimating the amount to be paid; that the jury gave a verdict for an amount mentioned, and that then the sheriff gave judgment, and ordered payment of that amount to the plaintiff; that the commissioners and sheriff were proceeding to enter and record the verdict and judgment, and to use, act upon, and make them available; and the declaration then prayed that the sheriff and commissioners might be prohibited from

entering and recording the said verdict and judgment, and from further proceeding for the purpose of using, acting upon, or otherwise making them available; it was held, on demurrer, that the declaration was bad, that no excess of jurisdiction was shown, that the verdict and judgment were binding and conclusive, and that the recording them was not a condition precedent to their validity; that the sheriff, after ordering payment of the sum assessed, was functus officio, and that the payment of the money into the Bank of England was an act belonging to the executive government, and not the subject of prohibition. (*Chabot v. Lord Morpeth*, 15Q. B. 446.)

Where the statute requires no regular form of an inquisition, the enactment that such inquisitions should be kept among the records of sessions, and should be records, does not render it necessary to draw them up with the formality required in setting out the judgment of an inferior court. (Per *Littledale, J., Reg. v. Trustees of Swansea Harbor*, 8 Ad. & F. 439.)

A special authority delegated by act of parliament to particular persons, to take away a man's property against his will must be strictly pursued, and must appear to be so upon the face of the proceedings. (*Rex v. Croke*, Cowp. 26. See *ante*, p. 280.)

Under a turnpike act the trustees had power to turn roads through private grounds, making satisfaction to the owners; and if they could not agree, they were enabled, on giving notice to the owners, to summon a jury to ascertain the damage and to order such sum so ascertained to be paid to the owners. The court quashed an inquisition of the jury, and an order of the trustees under that act, because it did not appear on the face of the proceedings that any notice* had been given to the owners of the land. (*Rex v. Bagshaw*, 7 T. R. 363. See *Rex v. Trustees of Norwich and Watton Road*, 5 Ad. & E. 563; 1 Nev. & P. 32; *ante* p. 288.)

The rule that where an extraordinary jurisdiction is exercised by the sheriff, every preliminary required by the act to give it should be set out on the face of the inquisition, applies to proceedings in cases of compensation. But a section which is in substance a defeasance of the compulsory clauses of the act need not be set out on the face of the inquisition,

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c. 18.
Sect. 50.

Form of in-
quisition.

Compliance
with act
must appear
upon pro-
ceedings.

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8 & 9 VICT. c. 18. but ought to come by way of answer from the other side.
 Sect. 50. (*Rex v. Theed*, 2 Lord Raym. 1375; 1 Str. 608; *Rex v. Hall*, 1 T. R. 320; *Doe d. Payne v. Bristol and Exeter Railw. Co.* 2 Railw. C. 91, 94; *Reg. v. Trustees of Swansea Harbor*, 8 Ad. & E. 439; 1 P. & D. 512; *Rex v. Mayor &c. of Liverpool*, 4 Burr. 2244; *Rex v. All Saints, Southampton*, 7 B. & C. 785; *Day v. King*, 5 Ad. & E. 359; 6 Nev. & M. 845; *Brook v. Jenny*, 1 Gale & D. 567; 6 Jur. 623; 2 Q. B. R. 274; *Jenny v. Brook*, 8 Jur. 781; Shelford's Highway Act, 114, 2d ed.; *Christie v. Unwin*, 11 Ad. & E. 373; 3 P. & D. 204; *Reg. v. Manchester and Leeds Railw. Co.*, 8 Ad. & E. 413; 1 P. & D. 164.)

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Notice must
 appear upon
 inquisition.

Although notice, and all things necessary to give authority ought to appear on the face of the inquisition, yet the party for whose benefit it is intended may waive the objection. (*Reg. v. South Holland Drainage*, 8 Ad. & E. 429; 1 P. & D. 79.)

It seems that the rule requiring that, in proceedings by an inferior jurisdiction, the facts giving the jurisdiction should appear on the face of such proceedings, is not confined to facts necessarily within the knowledge of the party exercising the jurisdiction. (*Reg. v. Manchester and Leeds Railw. Co.*, 8 Ad. & E. 413; 3 N. & P. 439; 1 P. & D. 164.)

Where the whole objection is confined to the face of the proceedings themselves, it is sufficient, if expressly or by necessary intendment the proceedings show that they were warranted by the statute. The warrant and inquisition when annexed together, and stated in the special verdict, may be considered as one entire proceeding and any deficiency existing in the one may be aided by reference to the other. If no particular form is prescribed by the statute, it will be sufficient if the jurisdiction is substantially made apparent upon the face of the documents, or is to be inferred therefrom. (*Taylor v. Clemson*, 3 Railw. C. 90; 2 Q. B. R. 978; Law J. 1842, Exch. Ch. 447; 8 Jur. 833, H. L.; 11 Cl. & F. 610.)

By a railway act (6 & 7 Will. 4, c. cxi. s. 138,) it is enacted

that if any landowner, &c., shall not agree with the company as to the amount of the purchase money for his lands, or shall refuse to accept such purchase money, or to treat with the company, or should not agree for the sale, or shall by reason of absence, &c. be prevented from treating or shall not disclose his title, or in any other case when agreement for compensation cannot be made, the company shall *issue their warrant to the sheriff to summon a jury to assess the purchase money for such land, and the sheriff shall give judgment, and the verdict and judgment shall be binding and conclusive upon all persons whatsoever: provided that seven days' notice shall be given by the company to the party of the time and place of holding the inquisition. By sect. 140, such verdicts and judgments shall be deemed records to all intents and purposes. Section 5 provides, that the company may make the railway through lands omitted in the act &c., if it should appear to two justices, *in case of a dispute about the same*, and be certified by them, that such omission proceeded from mistake. In an action for use and occupation, the defence was, that the defendants had been lawfully evicted by the railway company under the above act. A special verdict was found, which stated that the plaintiff's premises in question consisted of a house, and a yard and garden occupied therewith, and included in the description thereof; that the *house* had been *omitted* in the schedule by mistake, and was so certified by two justices; that the company had given the plaintiff notice to treat; that he did not disclose his title, or agree for the sale; whereupon they issued their warrant for assessing the amount of purchase money, and gave him due notice of the inquisition; that the inquisition was held before the sheriff, and the amount assessed; that the sheriff gave judgment for it, and that the company had paid it into the Bank of England to the credit of the plaintiff. The verdict set out the certificate of justices, the notices, and the inquisition, with the warrant annexed to it. The warrant stating that it was issued pursuant to the act, commanded the sheriff to summon a com-

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c. 18.
Sect. 50.

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c. 18

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pensation jury, &c. The inquisition stated that the jury had been returned in obedience to the warrant, the purchase money awarded, and judgment given by the sheriff pursuant to the act. It was objected, first, to the warrant and inquisition, that they did not on the face of them show jurisdiction, not stating which of the cases under section 138 had arisen to justify the taking compulsory proceedings, or the certificate of the justices, and that the inquisition did not set out the notice of inquisition. Secondly, to the certificate, that it did not state that a *dispute* existed between the parties, so as to give jurisdiction to the justices, and that it certified as to *the house only*, omitting the *yard* and *garden*, which were also omitted in the schedule. It was held, first, that the warrant and inquisition being annexed together might be considered as one entire proceeding, and any deficiency existing in the one might be aided by reference to the other; and that as the warrant stated that it had been issued, and the inquisition that judgment had been given for the purchase money pursuant to the act, the proceedings themselves upon fair intendment afforded the inference that a previous agreement for the purchase could not be made. That the statement of the certificate was not necessary, the effect of it being simply to rectify the omission in the schedule, and to extend the operation of the statute to the land, *&c. in the certificate, as if they had been originally inserted in the schedule. Secondly, that the fact of the justices being applied to and granting their certificate, was evidence of a *dispute*, so as to render the statement unnecessary; for the very circumstance of recourse having been taken by the company to the compulsory means of ascertaining the amount of the purchase money by summoning the jury, and the proceeding to judgment in the regular mode pointed out by the statute, afforded the natural and necessary inference that a previous agreement for the purchase could not be made; and that as the verdict found that the yard and garden were parcel of and included in the description of the house, and occupied therewith, they passed it. (See *ante*, pp. 235, 237; *Taylor v. Clemson*, 3 Railw. C. 65; 2 Q. B. R. 978; 8 Jur. 833, H.

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L. ; 11 Cl. & F. 610. See *Rex v Manning*, 1 Burr. 377.) This case was distinguishable from the cases *Rex v. Manning* 1 Burr. 377); *Rex v. Mayor, &c. of Liverpool* (4 Burr 2244); *Rex v. Bagshaw* (7 T. R. 363); *Day v. King* (5 Ad. & E. 359; 6 Nev. & M. 845), relied on by the plaintiff, in this material point, that the omission or want of averment on the face of the proceedings, which formed the objection in those cases, could not be supplied by any intendment from the facts stated in the instrument itself, or from the fact that the order or instrument itself was made; whereas in the present case it was thought impossible, upon reading the warrant and inquisition, to arrive at any other conclusion than that the company must have proceeded on the ground that no agreement could be previously made. It was thought a sufficient answer to the objection that the certificate was not mentioned in the inquisition, that the effect of the certificate was simply to rectify the mistake or omission in the schedule to the railway act, and to extend its operation to the lands included in the certificate, so as to place them precisely in the same situation as if they had been originally inserted in the schedule.

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c. 18.
Sect. 50.

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By the Bristol and Exeter Railway Act (6 & 7 Will. 4. c. xxxvi., s. 25,) it was enacted, that if any person should, for twenty-one days after notice in writing, neglect or refuse to treat, or not agree with the company for the sale of his estate or interest in land required by them for the purposes of the act they might issue their warrant to the sheriff of the county to summon a jury to assess the sum to be paid for the purchase of such lands; and that fourteen days' notice of the time and place at which such jury was summoned should also be given to him. Section 242 provided, that the whole capital (1,500,000*l.*) should be subscribed before any of the powers of the act as to the compulsory taking of land should be put in force. An inquisition taken under section 25 recited, that notice in writing had been duly given to C. H. P. by the company that his land was required; and that he had

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not within twenty-one days after such notice agreed with them for the sale thereof, and that fourteen days' notice of the time and place of holding such inquisition had also been given to him. The land being afterwards taken by the company *under the act, and an action of ejectment brought by C. H. P. for their recovery; it was held that the inquisition set out in form sufficient to give the sheriff jurisdiction, and that the proviso of section 242, being in substance a defeasance of the compulsory powers of the act, need not be set out, but should come by way of answer from C. H. P. (*Doe d. Payne v. Bristol and Exeter Railw. Co.*, 2 Railw. C. 75; 6 Mee. & W. 320.)

By a statute (6 & 7 Will. 4. c. cxxvi,) empowering trustees of a harbor to purchase lands for certain purposes, it was enacted, that in case of difference between the trustees and any landowners as to compensation, and if the same could not be agreed for, or the landholder should refuse, &c., to treat after twenty-one days' notice, the trustees might issue their warrant to the sheriff to summon a jury, who should appear before the justices at quarter sessions, and should there assess the compensation, and the justices should accordingly give judgment for the same; and that the verdict and judgment should be kept by the clerk of the peace among the records of the sessions, and should be deemed records; also that, if the verdict should be for a sum exceeding or the same as that offered by the trustees, they should pay costs to the landholder; if for a less sum, then the costs should be borne equally by the parties; such costs, if necessary, to be recovered under a justice's warrant of distress, the amount to be ascertained by a justice. The trustees offered money for certain land; the landholder did not accept it, but desired that the amount might be settled by a jury. In the meantime, at their request, he consented that they should take possession, agreeing to pay him interest on the amount of the future compensation. The inquiry was held, and compensation assessed. An inquisition was drawn up, purporting to be taken at sessions under the statute, and stating that

the trustees and landlord appearing by their counsel, the jurors, being sworn to inquire of the purchase money of the lands (specified) and recompence for damage, did assess and give a verdict for the sum of &c., for land, and the sum of &c., for damage; whereupon the said court did adjudge and order the said sums to be paid by the trustees. On cross motions for a mandamus to pay, and a certiorari to bring up the inquisition, it was held, that the non-statement in the inquisition, of any preliminary requisite to the taking of it (as twenty-one days' notice to treat), could not be insisted upon by the trustees, whose business it was to institute the proceedings; that the fact of differences having existed sufficiently appeared by the inquisition; that the inquisition was not irregular in omitting to state whether or not the sum assessed exceeded or equalled the sum offered by the trustees. The court granted a mandamus, and discharged the rule for a certiorari. (*Reg. v. The Trustees of Swansea Harbor*, 8 Ad. & E. 439; 1 P. & D. 512; 3 Jur. 85.)

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c. 18.
Sect. 50.

Where a canal company were authorized by an act to purchase lands necessary for the navigation, and were required to enrol the conveyance of such purchased lands with the *clerk of the peace, copies whereof were to be good evidence in all courts, the court, after a lapse of sixty-five years from the time of the purchase of certain lands, during which no application had been made to the company to enrol the conveyances, refused to grant a mandamus to that effect on the refusal of the company to do so. (*Reg. v. Leeds and Liverpool Canal Co.*, 3 Per. & D. 174; 11 Ad. & E. 316.) [*294]

Where a railway act directed that verdicts, and the judgments thereon (in compensation cases,) being first signed by the person presiding, shall be deposited with and kept by the clerk of the peace for the county among the records of the quarter sessions, and shall be deemed records to all intents and purposes, and that such records and true copies of them shall be evidence, it was held that where the verdict of the compensation jury had never been recorded, parol evidence might be given of their finding and of the grounds on which

8 & 9 VICT. c. 18. it proceeded. In this case the verdict was proved by the
Sect. 51. under-sheriff before whom the inquisition was held, and by a receipt for the compensation money. (*Manning v. Eastern Counties Railw. Co.*, Law J. 1844, p. 265, Exch.; 3 Railw. C. 637.)

Costs of the inquiry how to be borne.

LI. On every such inquiry before a jury, where the verdict of the jury shall be given for a greater sum than the sum previously offered by the promoters of the undertaking, all the costs of such inquiry shall be borne by the promoters of the undertaking; but if the verdict of the jury be given for the same or a less sum than the sum previously offered by the promoters of the undertaking, or if the owner of the lands shall have failed to appear at the time and place appointed for the inquiry, having received due notice thereof, one half of the costs of summoning, impanelling and returning the jury, and of taking the inquiry and recording the verdict and judgment thereon, in case such verdict shall be taken, shall be defrayed by the owner of the lands, and the other half by the promoters of the undertaking, and each party shall bear his own costs, other than as aforesaid, incident to such inquiry (*h*).

(*h*) Where a jury summoned by a railway company under this act to assess compensation, give the same amount to the landowner as the company had previously offered, the company are not entitled under sections 51 and 52 of this act to call upon the landowner to defray any portion of their costs for counsel, attornies or witnesses, as being costs of taking the inquiry. (*Bray v. South Eastern Railw. Co.*, Law J. 1850, Q. B. 10; *South Eastern Railw. Co. v. Richardson*, 26 Jur. 14; 11 C. B. 154.)

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A railway company gave notice to the owner of their intention to take certain lands for the purpose of carrying out the projected railway, and also that a jury would be summoned in pursuance of the 38th section of this act, to assess compensation, and offered a sum which they were willing to give. After the notice had been given for the execution of the warrant, a much larger sum was offered by the company, and refused. The jury gave a verdict for the amount so last offered. (*Erle. J.*, thought this was not a sum previously offered, within the meaning of this

section, so as to deprive the claimant of his right to costs 8 & 9 Vict.
 (*Ross v. York, Newcastle, and Berwick Railw. Co.*, 5 c. 18.
 Dowl. & L. 695; 5 Railw. Cas. 516; 13 Jur. 610; 18 L. J.,
 Q. B. 199. See *Reg. v. Waterford and Limerick Railw.* [295]
Co., 13 Ir. L. R. 272.) Sect. 52.

LII. The cost of any such inquiry shall, in case of difference be settled by one of the masters of the Court of Queen's Bench of England or Ireland, according as the lands are situate, on the application of either party, and such costs shall include all reasonable costs, charges and expenses incurred in summoning, impanelling and returning the jury, taking the inquiry, the attendance of witnesses, the employment of counsel and attornies, recording the verdict and judgment thereon, and otherwise incident to such inquiry (*i*). Particulars
of the costs.

(*i*) The power of settling costs given to the master by this section invests him with the character of an original arbitrator, and the court will not review his decision. Where the court refers the taxation to its officer, it has the power of reviewing it; because the power of the officer is delegated to him by the court. This act is not effective, unless adopted by the court. But the taxation under this section is made without any delegation of power from the court, and without any express or implied authority to review. (*Re Ross and York, Newcastle, and Berwick Railw. Co.*, 5 Railw. C. 516; 5 D. & L. 695; see *Morgan v. Smith*, 9 Mees. & W. 427.)

The costs of any "such inquiry" in this section refer to the inquiry spoken of in the earlier part of the 51st section, namely, where the landowner recovers more than the sum offered by the company. (*Bray v. South Eastern Railw. Co.*, 7 D. & L. 307; 19 Law J., Q. B. 11.)

Where, therefore, he recovers less, or an equal sum, the company is entitled only to one-half of the formal costs of the inquiry, and not to one-half of the costs of the witnesses and counsel also. (*Ib.*)

The court refused to grant a mandamus to compel the payment of costs, before they had been taxed and attempted to be levied in the mode prescribed by the acts. (*Reg. v. Lon-*

8 & 9 VICT.
c. 18.

Sect. 52.

Décisions as
to costs up-
on ana'gous
enactments.

don and Blackwall Railw. Co., 4 Railw. C. 110 ; 3 D. & L. £99.)

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Although the provisions in the above act upon the subject of cost differ in some respect from the provisions in the railway acts upon which the following decisions were made, yet *it may be useful to state them, for if they will not apply to future railway acts, still they may be applicable to many other acts which have already been passed. A railway act (6 Will. 4, c. xiv.) provided (s. 78) for summoning a jury to assess compensation in case of disagreement respecting the purchase of land, and *that the party claiming compensation should be plaintiff, and have all such rights and privileges as plaintiffs in actions at law are entitled to.* Section 83 enacted, "that in every case in which the verdict of the jury shall be given for the same or a greater sum than shall have been previously offered by the company, *all the costs of summoning such jury, and the expenses of witnesses,* shall be defrayed by the said company; if for a lower sum, then one moiety by each of the parties." Section 84 provided; "that all parties with whom the company shall have any such dispute, and who shall require a jury to be summoned, shall enter into a bond to bear and pay their proportion of *the costs and expenses of summoning and returning such jury, and taking such verdict, and of the summoning and attendance of witnesses,* in case any part of such costs and expenses shall fall upon them." In a case where no offer had been made by the company, but a jury had been summoned and assessed compensation to the claimant, it was held that the above clauses (notwithstanding the provisions of s. 78) did not entitle the claimant to the costs of the attorney's letters and attendances, nor to the expenses of plans, &c., paid to surveyors not called as witnesses. (*Reg. v. The Sheriff of Warwickshire*, 2 Railw. C. 661.)

A statute enacted that "the costs and expenses of the notice or notices, precept or precepts, and of summoning and returning the jury and witnesses, and also of *the said inquest,* should be paid by the company." The claimant's attorney

made out a bill as in the case of a common trial, containing charges for attendances, conferences, brief, &c., and an item as follows: "22d January. Attending this day at the Guildhall all day, when case heard and compensation fixed at 720*l.*, 3*l.* 3*s.* Paid the following witnesses for their attendance and loss of time in surveying, measuring and valuing the property in question, and in attending as witnesses at the inquest." The names of the witnesses and sums paid were then added. The justice, who had the power under the statute to allow, disallowed the costs in the bill. But the Court of King's Bench granted a mandamus to compel the allowance of "the costs and expenses incurred in and about the inquest." *Denman*, C. J., said, "In this case the words '*also the said inquest*' must mean something besides that denoted by the preceding words, and I cannot draw any line; I think they must mean all costs whatsoever; it is the case of a trial where one party obtains a verdict." And per *Taunton*, J., with respect to the costs of surveyors, "I should pause before saying that costs are to be allowed for them *qua* surveyors, but if they have been witnesses they will be on the same footing as others. (*Rex v. Justices of York*, 1 Ad. & E. 828; 3 Nev. & M. 625. See *Cone v. Bowles*, 1 Salk. *205.) In *Reg. v. Sheriff of Warwickshire*, (2 Railw. C. 666,) *Coleridge*, J., said the words "costs of the inquest" would have been in common understanding the costs of the inquiry, and that would have let in the general expenses as in an ordinary case.

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c. 18.
Sect 52.

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The words of a statute giving costs were "all the costs of summoning such jury and the expenses of witnesses shall be defrayed by the said company." A rule was obtained, that all "such costs might be allowed as are usually given to the successful party in trials of civil causes in the Court of King's Bench." It appeared that the bill of costs of the claimant's attorney for conducting the inquisition, including the fee of counsel, the expenses of certain surveys that had been made and the expenses of the attorney in preparing the brief, attending the inquisition, and negotiating with the company,

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c. 18.
Sec. 52.

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amounted to 34*l.* 7*s.* 4*d.* All those items were disallowed, and nothing more was disallowed than the expenses of summoning and attendance of [the jurors and witnesses, and so much of the expenses of the surveys as was incurred with a view to the trial, amounting altogether to 63*l.* 5*s.* It was said by *Denman*, C. J., "If there were any words which would at all justify our allowing the fee to counsel, and the costs of the attorney in conducting the inquiry, I should have no hesitation in giving them a liberal construction, and I think it very unjust that those costs are not provided for by the act of parliament." The rule was therefore discharged. (*Rex v. Gardiner*, 1 Nev. & P. 308; 6 Ad. & E. 112.)

By the first act of the Blackwall Railway Company it was provided that if the jury gave the same or a greater sum than the company had previously offered, the company should pay all the costs of the inquisition; if less than had been previously offered, that each party should pay half the costs; and that if by reason of absence abroad, or any other disability, any person should have been prevented from treating with the company, then the company should pay the whole costs. The second act was silent as to costs. It was held, that a party proceeding under the second act, in a case not falling within the classes mentioned in the first, was not entitled to costs. (*Corrigal v. London and Blackwall Railw. Co.*, 5 Man. & Gr. 220; 6 Scott, N. R. 241; 2 Dowl. N. S. 851; 3 Railw. C. 411.)

The act of parliament which regulated the taking and using of land by the Great Western Railway Company, empowered them to purchase the vicarage house of T., and authorized the purchase of other land, and the building a new vicarage house with the purchase or compensation money, but did not provide for the costs and expenses of obtaining the compensation money out of court to defray the expenses of the building; the express words of the act only declaring the liability of the company to pay such costs where the compensation money is taken out of court to invest in the purchase of lands. It was held that the company were not liable for the

costs, charges and expenses attendant upon obtaining the compensation money out of court for the purpose of building the new vicarage. (*Ex parte Madon, re Great Western Railw. Co.*, 9 Jur. 74.)

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c. 18.
Sect 53.
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In a claim for compensation against a railway company, the party by agreement submitted the matter to arbitration instead of taking the verdict of a jury, under a compensation clause of the company's act. The deed of reference and the award was silent as to costs: it was held that, although the award was in favor of the claimant, the provisions of the act with regard to costs did not apply. (*Regnall, Ex parte*, 5 Railw. Cas., 60.)

The Court of Chancery has no jurisdiction on an application for a reference for taxation of a bill of costs, in a summary way, to adjudicate on an agreement in writing entered into between the parties relative to the solicitor's costs, charges and expenses; but if there be circumstances of an equitable nature, as well as of a legal nature, in each case an application to stay the process in the action at law must be made to the court upon a bill filed, seeking equitable relief. (Stat. 2 Vict, c. xxvii. relating to the Great Western Railway; and *In re Rhodes*, Law. J. 1845, Ch. 97; *Ex parte Great Western Railw. Co.*, 3 Railw. Ca. 516; 8 Beav. 224.)

Chancery
has no jurisdiction upon
a summary application
to adjudicate upon an
agreement as to costs.

LIII. If any such costs shall be payable by the promoters of the undertaking, and if within seven days after demand such costs be not paid to the party entitled to receive the same, they shall be recoverable by distress, and on application to any justice he shall issue his warrant accordingly; and if any such costs shall be payable by the owner of the lands or of any interest therein, the same may be deducted and retained by the promoters of the undertaking, out of any money awarded by the jury to such owner, or determined by the valuation of a surveyor under the provision hereinafter contained; and the payment or deposit of the remainder, if any of such money shall be deemed payment and satisfaction of the whole thereof, or if such costs shall exceed the amount of the money so awarded or determined, the excess shall be recover-

Payment of
costs.

8 & 9 VICT. c. 18. able by distress, and on application to any justice he shall issue his warrant accordingly.

Sect. 54.
Special jury
to be summoned at the
request of
either party.

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LIV. If either party desire any such question of disputed compensation as aforesaid to be tried before a special jury such question shall be so tried, provided that notice of such desire, if coming from the other party, be given to the promoters of the undertaking before they have issued their warrant to the sheriff; and for that purpose the promoters of the undertaking shall by their warrant to the sheriff require him to nominate a special jury for such trial; and thereupon the sheriff shall as soon as conveniently may be after the receipt by him of such warrant *summon both the parties to appear before him, by themselves or their attornies, at some convenient time and place appointed by him for the purpose of nominating a special jury (not being less than five nor more than eight days from the service of such summons); and at the place and time so appointed the sheriff shall proceed to nominate and strike a special jury, in the manner in which such juries shall be required by the laws for the time being in force to be nominated or struck by the proper officers of the superior courts, and the sheriff shall appoint a day, not later than the eighth day after the striking of such jury, for the parties or their agents to appear before him to reduce the number of such jury, and thereof shall give four days' notice to the parties; and on the day so appointed the sheriff shall proceed to reduce the said special jury to the number of twenty, in the manner used and accustomed by the proper officers of the superior courts.

Deficiency of
special jury-
men.

LV. The special jury on such inquiry shall consist of twelve of the said twenty who shall first appear on the names being called over, the parties having their lawful challenges against any of the said jurymen; and if a full jury do not appear, or if after such challenges a full jury do not remain, then upon the application of either party, the sheriff shall add to the list of such jury the names of any other disinterested persons qualified to act as special or common jurymen, who shall not have been previously struck off the aforesaid list, and who may then be attending the court or can speedily be procured, so as to complete such jury, all parties having their lawful challenges against such persons; and the sheriff shall proceed to the trial and adjudication of the matters in question by such jury, and such trial shall be

attended in all respects with the like incidents and consequences, and the like penalties shall be applicable, as hereinbefore provided in the case of a trial by common jury (*k*). 8 & 9 VICT.
c. 18.
Sect. 56.

(*k*) See ss. 43—45, *ante*, pp. 282, 283.

LVI. Any other inquiry than that for the trial of which such special jury may have been struck and reduced aforesaid may be tried by such jury, provided the parties thereto respectfully shall give their consent to such trial. Other inquiries before same special jury by consent.

LVII. No juryman shall, without his consent, be summoned or required to attend any such proceedings as aforesaid more than once in any year. Jurymen not to attend more than once a year.

LVIII. The purchase money or compensation to *be paid for any lands to be purchased or taken by the promoters of the undertaking from any party who, by reason of absence from the kingdom, is prevented from treating, or who cannot after diligent inquiry be found, or who shall not appear at the time appointed for the inquiry before the jury as hereinbefore provided for, after due notice thereof, and the compensation to be paid for any permanent injury to such lands, shall be such as shall be determined by the valuation of such able practical surveyors as two justices shall nominate for that purpose as hereinafter mentioned. [*300]
Compensation to absent parties to be determined by a surveyor or to be appointed by two justices.

LIX. Upon application by the promoters of the undertaking to two justices, and upon such proof as shall be satisfactory to them that any such party is by reason of absence from the kingdom, prevented from treating, or cannot after diligent inquiry be found, or that any such party failed to appear on such inquiry before a jury as aforesaid, after due notice to him for that purpose, such justices shall, by writing under their hands, nominate an able practical surveyor for determining such compensation as aforesaid, and such surveyor shall determine the same accordingly, and shall annex to his valuation a declaration in writing subscribed by him of the correctness thereof (*k*). Two justices to nominate a surveyor.

(*k*) See 8 & 9 Vict. c. 18. s. 47, *ante*, p. 283.

LX. Before such surveyor shall enter upon the duty of making such valuation as aforesaid he shall, in the presence of such justices, or one of them, make and subscribe the de-

8 & 9 Vict. c. 18. declaration following at the foot of such nomination; (that is to say,) -

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'I, A. B., do solemnly and sincerely declare that I will
'faithfully, impartially and honestly, according to the
'best of my skill and ability, execute the duty of making
'valuation hereby referred to me. A. B.

'Made and suscribed in the presence of—'

And if any surveyor shall corruptly make such declaration, or having made such declaration shall willingly act contrary thereto, he shall be guilty of a misdemeanor.

Valuation,
&c. to be pro-
duced to the
owner of the
lands on de-
mand.

LXI. The said nomination and declaration shall be annexed to the valuation to be made by such surveyor, and shall be preserved together therewith by the promoters of the undertaking, and they shall at all times produce the said valuation and other documents, on demand, to the owner of the lands comprised in such valuation, and to all other parties interested therein.

Expenses to
be borne by
promoters.

*LXII. All the expenses of incident to every such valuation shall be borne by the promoters of the undertaking.

Railroad Co.
cannot be
compelled to
pay Commis-
sioners.

[*301]

(1) There is no provision of law, by which the Atlantic and St. Lawrence Railroad Company can be compelled by an order of the County Commissioners, to pay for their services and for their expenses incurred while they were employed on petitions, presented by the company, to have the damages assessed sustained by persons, by the location of that road, over their lands. (*Atlantic & St. Lawrence Railw. Co. v. Cumberland County Commissioners*, 28 Maine, 15 Shep. 112.)

Purchase
money and
compensa-
tion, how to
be estimated.

LXIII. In estimating the purchase money or compensation to be paid by the promoters of the undertaking, in any of the cases aforesaid, regard shall be had by the justices, arbitrators or surveyors, as the case may be, not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special act, or any act incorporated therewith (1).

(l) See 49th section, *ante*, p. 284.

8 & 9 Vict.
c. 18.
Sect. 64.

It is no objection under this section, to the award of an umpire, made under the 28th section, that the price of the land, and the compensation for damage by severance, though each is expressly claimed, are assessed in a gross sum. (*In re Bradshaw*, 12 Q. B. 562.) A claimant in respect of land of which he is tenant in fee, cannot object that the award assesses the compensation, on the assumption that he is in possession, whereas it is occupied by a lessee. (*Ib.*)

The court will not entertain the objection that the award is contrary to the evidence. (*Ib.*)

An attachment does not lie against a railway company for non-performance of an award. (*Mackenzie v. Sligo and Shannon Railw. Co.*, 9 C. B. 250.)

LXIV. When the compensation payable in respect of any lands, or any interest therein, shall have been ascertained by the valuation of a surveyor, and deposited in the bank under the provisions herein contained, by reason that the owner of or party entitled to convey such lands or such interest therein as aforesaid could not be found or was absent from the kingdom, if such owner or party shall be dissatisfied with such valuation it shall be lawful for him, before he shall have applied to the Court of Chancery for payment or investment of the monies so deposited under the provisions herein contained, by notice in writing to the promoters of the undertaking, to require the question of such compensation to be submitted to arbitration, and thereupon the same shall be so submitted accordingly, in the same manner as in other cases of disputed compensation hereinbefore authorized or required to be submitted to arbitration (*m*).

Where compensation to absent party has been determined by a surveyor, the party may have the same submitted to arbitration.

(*m*) *Ante*, ss. 25—37. pp. 265—274.

LXV. The question to be submitted to the arbitrators *in the case last aforesaid shall be, whether the said sum so deposited as aforesaid by the promoters of the undertaking was a sufficient sum, or whether any and what further sum ought to be paid or deposited by them.

Question to be submitted to the arbitrators.
[*302]

LXVI. If the arbitrators shall award that a further sum ought to be paid or deposited by the promoters of the under-

If further sum awarded promoters to

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pay or depos-
it same with-
in fourteen
days.

Costs of the
arbitration.

taking, they shall pay or deposit, as the case may require, such further sum within fourteen days after the making of such award, or in default thereof the same may be enforced by attachment, or recovered with costs by action or suit in any of the superior courts.

LXVII. If the arbitrators shall determine that the sum so deposited was sufficient, the costs of and incident to such arbitration, to be determined by the arbitrators, shall be in the discretion of the arbitrators, but if the arbitrators shall determine that a further sum ought to be paid or deposited by the promoters of the undertaking, all the costs of and incident to the arbitration shall be borne by the promoters of the undertaking.

To be settled
by arbitration
or jury at the
option of the
party claim-
ing compen-
sation.

LXVIII. If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for (*n*) or injuriously affected by (*o*) the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special act, or any act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of fifty pounds, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, (*l*) stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided (*p*), or if the party so entitled as aforesaid desire to have such question of compensation settled by jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid, and unless the promoters *of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within, twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a

jury for settling the same in the manner herein provided, and in default thereof they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed and the same may be recovered by him, with costs, by action in any of the superior courts (q)

8 & 9 Vict.
c. 18.
Sect. 68.

(1) A notice under the 68th section of the 8 Vict. c. 18, was served upon a clerk of the promoters of the Blackburn Railway Company at their office, being addressed "To the promoters of the Blackburn and Clitheroe Railway Company." There was no railway company of the latter name, but the railway in question ran from Blackburn to Clitheroe. The company had not been misled. Held, that the notice was good. (*Eastham v. Blackburn Railw. Co.*, 25 Eng. Law and Eq. 498.)

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(n) The words, "lands taken," in this section, mean lands actually taken into the possession of the company, and those alone. "After carefully considering the various clauses of the act preceding this section, we have arrived at the conclusion that this is the correct construction." Per *Pollock*, C. B. (*Burkinshaw v. Birmingham and Oxford Junction Railw. Co.*, 6 Railw. C. 609; 5 Exch. 475; 20 Law. J. Exch. 246. See *ante*, p. 261.)

(o) Where a railway company does that which would be an actionable injury to land, unless done under the powers conferred by their act, the owner or occupier is entitled to compensation. (*Glover v. North Staffordshire Railw. Co.*, 15 Jur. 673; 20 L. J. Q. B. 376.)

Injury to
lands for
which action
will lie.

A special verdict found that the only approach to the house of the plaintiff was by a private road; that a railway, constructed under the powers of the special act, crossed the road on a level, in an oblique direction, so that at the point where the railway intersected the road, a train coming along the railway at ordinary speed could not be seen for more than seventeen seconds before it reached that point; that there were gates on each side of the railway across the road, which were kept locked, under the provisions of the act, a key being kept by a servant of the company, whose business it was to unlock the gates when any person had occasion to

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pass through them, and the plaintiff also having a key; and by reason of the above facts, and of the execution of the works by the company, the property of the plaintiff was depreciated in value: it was held, that the lands of the plaintiff were "injuriously affected," within this section, by the erection of the gates, and per Lord *Campbell*, C. J., by the passage of trains along the railway. (*Ib.*)

Where the property of a landowner is depreciated in value by a railway company doing that which would support an action if done by a private individual, the landowner is entitled to be compensated in respect of his property being injuriously affected. (*Ib.*)

[*304] The defendants' railway passed across low lands adjoining a river, over which the flood waters used to spread themselves. The low lands were separated from the plaintiff's land by a bank, constructed under certain drainage acts, and which protected the plaintiff's land from floods. By the construction of the railway without sufficient openings, the *flood waters could not spread themselves as formerly, and were penned up and flowed over the bank on the plaintiff's land: it was held, that, though the defendants had constructed their railway across the low lands, according to the provisions of their special act, they were liable for an unforeseen injury to the plaintiff arising from the mode in which the railway was constructed. (*Lawrence v. Great Northern Railw. Co.*, 15 Jur. 652; 20 L. J. Q. B. 293; *ante*, p. 268.)

Lord *Truro*, C., is reported to have said, "whether an action will lie on behalf of a man who sustains a private injury by the execution of parliamentary powers, executed judiciously and cautiously, it is not an easy question, or rather it is not easy to come to a conclusion that an action will lie. I entertain a decided opinion (probably however erroneous), that no such action will lie." (*London and North Western Railway Co. v. Bradley*, 6 Railw C. 559.)

Formerly, the practice was to provide by each special act, that the party claiming compensation should call on the

company to take steps for summoning the jury. If the company considered the act complained of to be one in respect of which the statute did not entitle the claimant to compensation they refused to cause the jury to be summoned and the remedy of the claimant was to call on the company by mandamus to take the necessary steps. In the application for a mandamus, the question whether the case was or was not one entitling the party to compensation, was judicially decided; if in the negative, the mandamus was refused and there was an end of the case; if in the affirmative, a peremptory mandamus issued, the jury was summoned, and the amount of damage was assessed. (See *ante*, p. 277.)

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This act has departed from that course of proceeding, and the legislature has relieved the party claiming compensation from the necessity of applying for a mandamus, by enabling him to fix his own amount of damages, where damage within the meaning of this statute had been incurred, and by compelling the company to pay that amount, unless within twenty-one days they took measures for convening the jury. Where, therefore, the company dispute both the right of the party to recover any damages and the amount claimed, the only course given them by this statute is, first, to summon the jury, and then, supposing the jury to assess some amount of damage as due, to refuse payment of the sum so assessed, leaving the party to recover it by action. In such an action the claimant would be obliged to aver that he had sustained damage within the meaning of the statute. This averment would be traversed, and so the question of right would be determined. If the company do not dispute the amount claimed, but only deny the right of compensation at all, there they will of course refuse to summon a jury and will leave the party to bring his action for the amount claimed, and in such an action the right will at once be tried. (*South Staffordshire Railw. Co. v. Hall* 6 Railw. C. 395, 396. See *East and West India Docks and Birmingham Junction Railw. Co.*, 6 Railw. C. 384, 385.)

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*Lord *Truro*, C., was of opinion that these acts are framed with a view of giving a mode of trying the claimant's *right* to compensation, and the amount; first, because they contain no other mode in which a man can pursue his remedy in respect of injury sustained by the execution of railway works; and in the next place, because the legislature has thought fit to take away the ordinary remedy by *mandamus*. His lordship thought, looking at the whole of the purview of the acts, that it was intended that the sheriff and the jury (however imperfect the tribunal may seem to be) were authorized to decide not only the *amount* of compensation but also as to the right to compensation. (*London and North Western Railw. Co. v. Bradley*, 6 Railw. C. 556; *Reg v. Lancaster and Preston Railw. Co.*, 3 Railw. C. 725; 6 Q. B. 759; *Reg v. Eastern Counties Railw. Co.*, 3 Railw. C. 460.) (1).

Of the right of landholders to recover for consequential damages where no statute gives the right.

(1) It was held in *Fletcher v. Auburn and Syracuse Railroad Co.*, 25 Wind. 462, that the owner of land might have an action against a railroad company for raising an embankment across a highway in building their road, by means of which he was obstructed in passing to and from the highway, and his property injured; although the charter of the company authorized the entry upon, and the use of such highway; and so it was held, that a railroad company were trespassers by passing over a highway without permission of the owner of the soil, or paying him the damages assessed. (*Presbyterian Church v. Auburn Railroad Co.*, 3 Hill, 567. *Seneca Road v. Auburn Railroad Co.*, 5 Hill, 170. See *Miller v. Auburn and Syracuse Railroad Co.*, 6 Hill, 61.)

But we apprehend, both in England and in this country, it is well settled at the present day, that no action can be maintained against a Railroad Company for consequential damages to lands near their track, and no part of which have been taken for their railroad, provided no compensation is given by statute, and the injury complained of is not attributable to any improper manner in the construction of the road, but results necessarily from its location contiguous to the claimant's land, though *Fletcher v. Auburn and Syracuse Railroad Company* would seem contrary. See *Hatch v. the Vermont Central Railroad Company*, 25 Vermont, 47,

where the question is very fully considered; and the same principle was affirmed in *Richardson et al v. the same Railroad Comp.*, 25 Vermont. p. 465. See also *Knorr v. the Germantown Railroad Co.*, 5 Wharton 256; *Philadelphia and Trenton Railroad Co.*, 6 Wharton 26; *Railroad Co. v. Heiser*, 8 Barr 366; *Commonwealth v. Fisher*, 1 Penn. 467; *Bradley v. N. York & N. Haven Railr. Co.*, [305] 21 Ct. It has been made a question whether a railroad company who take a public highway to locate their road upon, can be made liable to the adjoining landowners, who own the fee in the road, for damages beyond what may have been paid them for the easement already acquired by the public; and it seems to have been held, that they could not, provided their charter or the general law does not require further compensation to be made. (See the *Philadelphia and Trenton Railroad Co.*, 6 Wharton 26.)

In a case in Barber's reports, a turnpike road was taken for a plank road upon compensation being made for their franchise; and it was held, that the adjoining landowners of the fee in the land taken for the turnpike, could have no action against the plank road company, though they increased the excavations and embankments beyond what had been done by the turnpike company, whereby they had sustained special damage. See also *Richardson et al v. Vermont Central Railr. Co.*, 25 Vermont 473, where the question was alluded to, but not decided.

The construction of any building on the banks or excavation of the Philadelphia and Columbia Railroad without permission given in writing, under the authority of the Canal Commissioners, is prohibited by law, under a penalty of not exceeding one hundred dollars, and such prohibition extends to the banks, as enlarged for the time being; and the officer or agent having charge of such railroad may remove and destroy every such structure, without being liable to an action of trespass, if not done maliciously. (Downing v. McFadden, 18 Penn. Stat., 6 Harris, 344.)

A landowner, whose property was not touched by the railway, gave the company notice in the terms of this section, of his claim for compensation by reason of his property being "injuriously affected" by the stopping up of a street, and required the company to summon a jury to settle the compensation. The company filed a bill, alleging that the land in question was not injuriously affected within the meaning

If a structure is made wrongfully on the banks or excavation of a Railroad, the company not liable to an action for its removal.

Injunction to restrain proceedings under this section.

8 & 9 VICT. of this section, and praying an injunction to prevent the
 c. 18 defendant from proceeding on his notice : it was held, grant-
 Sect. 68. ing the injunction, that two proceedings being necessary, one before the sheriffs's jury to assess the actual damage, and another, an action to try the right to the damages, the Court of Chancery had jurisdiction to direct that an action to try the right should be first brought, although the state of the statute law was in favor of the right of the landowner to have the damages assessed first. (*London and North Western Railw. Co. v. Smith*, 13 Jur. 417 ; 1 Hall. & T. 364 ; 1 Mac. & G. 216 ; 5 Railw. C. 716 ; see *Cromford Canal Co. v. Cutts*, 5 Railw. C. 442 ; *South Western Railw. Co. v. Coward*, 5 Railw. C. 703.)

The words "injuriously affected," in this section of the act, comprehend cases of injury independent of taking land and are not limited to damage sustained by persons whose lands or a part of whose lands are taken, used, or directly interfered with ; and the right of compensation extends to and may be asserted in respect of consequential damage. (*East and West India Docks and Birmingham Junction Railw. Co. v. Gattke*, 3 Mac. & G. 155 ; 15 Jur. 261 ; 20 L. J., Ch. 217 ; 6 Railw. C. 371.)

A lessee of premises not required for the purpose of a railway, served a notice and claim upon the company for a certain amount of compensation under this section. The alleged injuries resulted from the dust and dirt occasioned by the works of the railway, from the temporary diversion of a footpath which passed along the premises of the claimant, and from the stoppage of a lane along which the lessee claimed to be entitled to a right of way to the back of his premises. The company filed their bill, and obtained an injunction to restrain any further proceeding under the notice : it was held [*306] (dissolving an injunction which had been granted by the Vice-Chancellor *Wigram*), that the claimant was entitled to proceed under the notice, and to have the amount of compensation assessed by a jury. (*Ib*).

By summoning a jury to assess the amount of compensation claimed by a party under this section, the company is

not precluded from questioning the right of the claimant to any compensation whatever. (*Ib.*)

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The jury have jurisdiction to construe the act upon the point whether the claim made is within its provision. (*Ib.*)

Vice-Chancellor *Turner* observed, "*Gattke's case* has overruled the case of *London and North Western Railw. Co. v. Smith* (*ante*, p. 305), and has settled on most satisfactory grounds, that the Court of Chancery ought not to interfere by injunction to restrain parties who insist that their property has been injuriously affected within the meaning of this section, from prosecuting their claims according to the provisions of this act, upon the mere ground that the act has not provided the means of determining the preliminary question, whether the property has been injuriously affected or not: but it has settled no more." (*Duke of Norfolk v. Tennant*, 16 Jur. 400.)

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The words "injuriously affected," in this section of the act, comprehends cases of damage arising from the use of the railway, as well as of the damages sustained by the construction of the railway. (*London & North Western Railw. Co. v. Bradley*, 3 Mac. & G. 336; 15 Jur. 639; 6 Railw. C. 551.)

In this case, the lessee of an inn and premises situate near the tunnel of a railway, was prevented by the vibration caused by the passing of the trains, from keeping his beer in his cellars, in a fit state for consumption, and the value of the house was alleged to be materially lessened by the consequent loss of custom, and the impossibility of using it as a public house. He, thereupon gave notice to the company of his claim for compensation, under this section, and was prosecuting the remedy thereby given, when the company filed a bill and obtained an injunction to restrain him from proceeding further under it; but this injunction was dissolved. (*Ib.*)

Lord *Cranworth*, V. C., acting on the authority of *London and North Western Co. v. Smith*, (1 Mac. & G. 216), granted an ex parte injunction on the application of a railway company, restraining the landowner from taking proceedings under this section for settling the amount of compensation to be paid to him by the company. His lordship subsequently dissolved the injunction at the instance of the de-

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fendant, on the authority of *East and West India Docks and Birmingham Junction Railw. Co. v. Gattke* (3 Mac. & G. 115); in the meanwhile the time limited for taking proceedings under this section had expired. The company who had not raised the question before the Vice-Chancellor, appealed from the order dissolving the injunction, on the ground that it ought to have been made on such terms as that their rights *to take proceedings under this section might not be affected by the lapse of time. Lord *Truro*, C., refused the application. (*South Staffordshire Railw. Co. v. Hall*, 3 Mac. & G. 353; 6 Railw. C. 389; 1 Sim. N. L. 373.)

A harbor company, in the course of the necessary alterations, interfered with the facility of access to a quay. H., a coal shipper, thus interfered with, gave them notice to proceed to arbitration under this and other sections of this act. The court refused to restrain by injunction such proceedings to arbitration. (*Sutton Harbor Improvement Co. v. Hitchins*, 16 Jur. 70; 21 Law. J. Ch. 73; 1 De G. M. & G. 161; 15 Beav. 161.)

Damages were claimed by the owner of a brewery for injury done to it by the erection of a new market. The damages claimed were, 1st, for narrowing a street bounding the brewery; 2dly, for temporary obstruction of the thoroughfare; and, 3dly, for obstruction of light and air and contracted ventilation. This last damage did not appear to have been pressed or discovered until the new market buildings had risen to a considerable height. The defendant gave one notice, embracing all the three heads to proceed by arbitration according to the 25th and 68th sects. of this act; there had been a treaty for compensation for the two former heads, but it did not appear to have been completed and carried out. There had been no treaty for compensation as to the third: it was held, that the nature of the compensation treated for being quite clear, the defendant could be restrained by injunction from proceeding under the notice he had given, but the injunction was not to prevent the defendant from giving such other notice or notices of claims as he thought proper. (*Duke of Norfolk v. Tennant*, 16 Jur. 398.)

(1) It has been held, that the 68th section of this act, does not

give the arbitrators or jury jurisdiction to inquire into the title of the claimant to the land, or other hereditament in respect of which he claims compensation, but only to decide upon the question of amount. (*Regina v. the London and North Western Railway Co.*, 25 Eng. Law and Eq. 37, *Erle J.* dissenting.)

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Where a compensation jury negatived the evidence of *the right* in the claimant, and therefore found that he had sustained no damage, but awarding contingently 150*l* for compensation in case they were compelled to assume that the claimant had the right; it was held, that the prior part of the finding of the jury could not be rejected as surplusage, so as to make it a verdict for 150*l*. (*Ib.*)

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(*p*) This section of the Lands Clauses Consolidation Act, by which any party entitled to compensation in respect of lands taken, or injuriously affected by the execution of works, may give notice of his claim to the promoters, and the claimant may have the matter settled by a jury, incorporates all previous sections which are applicable, and among others, the 38th which requires the promoters to give notice of the amount of compensation they are willing to pay before summoning the jury; and also the 51st, which gives the claimant the costs of inquiry when he recovers more than the sum offered by the promoters. (*Richardson v. South Eastern Railw. Co.*, 20 L. J. C. P. 336; 11 C. B. 154; 16 Jur. 151, Exch. Ch.; 21 Law J. C. P. 122. This decision conflicts with that in the case of *Railstone v. York, Newcastle and Berwick Railw. Co.* (15 Q. B. 404; 19 L. J. Q. B. 464.) *Park, B.*, observed, "It is not necessary for us to say whether we concur in the opinion of the Court of Common Pleas that the case last cited was wrongly decided, for that case may be good law, and yet the decision in this case (*South Eastern Railw. Co. v. Richardson, supra*) may be also correct. (21 L. J. C. P. 123, 124.) (1)

Previous
sections in-
corporated
with this
section.

(1) It has also been settled, that the 68th section, which provides for the settlement of land damages by arbitration, *in the manner therein provided*; refers to the 23d section of the same act, and that the arbitrator is bound to make his award under the 68th section, within three months of the time, when the matter is re-

8 & 9 VICT. c. 18. fered to him for arbitration. (*Evans et al v. the Lancashire and Yorkshire Railway Company*, 18 Eng. Law and Eq. 425.)
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There is no equity arising from the provisions of the 68th sect. of the Lands Clauses Consolidation Act to restrain a party alledging himself "to be injuriously affected" from recovering compensation by an arbitration or a jury in the manner thereby prescribed, and the balance of authority was held to be against the decision of Lord Cottenham in the *London and Northwestern Railway Company v. Smith*, 1st of Hall and Tw. 364. (*The Lancashire and Yorkshire Railway Company v. Evans*, 19 Eng. Law and Eq. 295.)

[*308] (q) In an action of debt, under this act, for the amount of compensation claimed by the plaintiff according to this section *for his lands actually taken by the defendants, a railway company, the declaration alleged that the plaintiff gave the defendants notice in writing of his claim, which exceeded 50*l.*, and of his desire to have compensation assessed by a jury; that twenty-one days elapsed, and that the defendants did not give the plaintiff notice of their intention to issue a warrant, nor did they issue a warrant to summon a jury to assess compensation. Plea, that they did issue a warrant within twenty-one days. On demurrer, stating as ground that the plea, though pleaded to the whole count, left part of the breach unanswered: it was held, by Lord Campbell, C. J., Patteson and Erle, J. J., that no notice was required by the statute, and that the plea was good. Coleridge, J., dissentiente. (*Railstone v. York Newcastle, and Berwick Railw. Co.*, 15 Q. B. 404; see *Richardson v. South Eastern Railw. Co.*, ante, pp. 274, 275, 307.) (1)

(1) In 1848, a landholder gave a railway company notice for a jury to assess damages which he had alledged he had suffered. In 1849 he made a claim for further subsequent damages, and in 1850 gave notice for an arbitration to assess the whole damages, and it was held, that this was not irregular, and that the first notice had not exhausted all the statutory powers, and the distinction is made between damages done by a railway for which compensation may

be had under the statutory powers, and those for which a common action at law is the proper remedy. (*Lancashire and Yorkshire Railroad Co. v. Evans*, 19 Eng. Law and Eq. 296.)

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This section applies to cases in which possession has been taken under the 85th section, and therefore the initiative for summoning a jury is not cast upon the promoters, but upon the owner who is to make his claim, and thereby give the promoters an opportunity of settling his demand without litigation; and the owner has a remedy of having his claim converted into a right, if the promoters shall delay for twenty one days, and for that right he has a remedy by action.

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It is questionable, whether in a case depending exclusively on a notice to take land, given by the company under the provisions of this act, the court will interfere to compel the company to adopt the subsequent proceedings directed by the act for giving compensation to the landowner. In a case where such notice had been followed by a claim to compensation on the part of the landowner and a subsequent agreement between the parties, which claim and agreement were, however, ultimately abandoned and repudiated on both sides, the court, allowing a demurrer to a bill filed by the landlord, refused to interfere to compel the company, who were in possession of the land, to summon a jury; holding, that in this case the notice *per se* did not give the court jurisdiction, and that the rights of the parties were to be regulated by the provisions of this and the 86th sections of this act. (*Adams v. London and Blackwall Railw. Co.*, 2 Mac. & G. 118; 2 Hall & T. 285; 14 Jur. 679; 19 L. J. Ch. 557; 6 Railw. C. 271.)

If after the service of a notice to treat by a railway company, the party served replies thereto by a notice, stating his title to the lands and the compensation he claims, and the company neither refer the matter to arbitration nor summon a jury to decide it, they thereby acquiesce in the offer made, and the owner under this section may maintain an action for

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the amount claimed. (*Eaton v. Midland Great Western Railw. Co.*, 10 Ir. L. R. 310. (1) .

Private property cannot be taken without authority from the Legislature, and upon compensation being made, but compensation is not required to be made for lands consequentially injured, unless the charter imposes the duty.

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(1) The right to take private property for the construction of a railway rest upon the ground, that it is an *improved highway*, and it may be well to bring together the American Law upon this subject in a single note, showing how far a railway company may acquire an interest in lands by a compulsory purchase, and the restrictions to such a right; and the mode and manner, and the conditions upon which it can be exercised. The exercise of this right, can only be justified in consideration of a public benefit, which, on the whole, it is hoped may be obtained by the public; and this power is exercised through the right of *eminent domain*; and it being for the public interest to protect the private rights of all individuals, and to save them from all unnecessary exactions on the part of the government, it is important that the private rights of individuals should be carefully looked after by Courts and Legislatures; and hence it is that powers given by such acts, should not be extended by construction, further than expressly given in the act, or necessarily and properly acquired for the purposes for which the act was granted, and to carry out its object. In the case of the *State v. Baltimore and Ohio Railroad Co.*, 6 Gill, 363, the rule was laid down, that in all questions of power, arising under an act of Assembly granting a railway franchise, the test of the existence of the power is to be found in the inquiry, whether the same is expressly granted, or whether it is incidental to any express grant of power, and necessary to its accomplishment. What precise limits shall be fixed in a given case to the exercise of powers by *implication*, as being necessary to carry out the purposes intended by the act, will often be attended with difficulty, and each case must stand upon its own peculiar facts and circumstances.

Though private property is taken for public use, by the government, in the right of *eminent domain*, yet, the exercise of this right has been limited and qualified in this country, by constitutional provisions; and it may be well to subjoin some of the constitutional provisions in the different States, and the decisions under them. The cardinal principle is, that *compensation* must be made. (*Louisville Railroad Co. v. Chappell*, 1 Rice 383.)

The second article in the constitution of Vermont provides that

when "any personal property is taken for the use of the public, the owner ought to receive an equivalent *in money*." A railroad is an improved highway, and property taken for a railroad is as much taken for public use within the purview of the Constitution as if taken for any other highway, and the Legislature have as good a right to delegate to a railroad company the power to take private property for a railroad, as to a turnpike company to take it for a turnpike road. (*White River Turnpike Co. v. Vermont Central Railroad Co.*, 21 Vermont 590; *Beekman v. Saratoga and Sche. Railroad Company*, 3 Paige 45; *Whiteman v. Wilmington and Susquehanna Railroad Co.* 2 Harrington, 514; *Bloodgood v. Railroad Co.*, 18 Wendall 9.) And it is the right of *eminent domain* which gives to a Legislature the authority to control private property for public uses, subject to the condition, that compensation be made for it. (*Hamilton v. Annapolis and Elk Ridge Railroad Co.*, 1 Maryland, Chancery Decisions, 107; *Harness v. Chesapeake & Ohio Canal Co.*, 1 Maryland, Chan. Decis. 248.) And though a railroad company derives its powers from the State, yet it does not act in behalf of the State, or as its instrument or agent, but under a special grant acquired for a valuable consideration for the promotion of its own direct and private advantage. (*Bradley v. New York and New Haven Railroad Co.* 21 Connecticut, 294.) It seems to be well settled, that the private property of a corporation and even their franchise are equally liable to be taken for public use, as the property of individuals. In both cases however, compensation must be made. (*Armington v. Barnett*, 15 Vt. 745; *West River Bridge Co. v. Dix*, 16 Vt. 446; same case in Error in Sup. Court of U. S., 6 Howard U. S. 507; *White River Turnpike Co. v. Vermont Central Railroad Co.*, 21 Vt. 594; *Boston Water Power Company v. B. & W. Railroad Co.*, 23 Pick. 360; *Enfield Toll Bridge Co. v. H. & N. H. Railroad Co.*, 17 Conn. 454.)

The case of *Livermore et al v. Jamaica*, 23 Vt., 362, proceeds upon the ground, that the taking of land for a highway, and of course for a railroad, is not such a taking of the property to public use, as to come within the purview of the Constitution requiring compensation to be made, but *quære*.

The Constitution of Vermont would seem to require the compensation for the intrinsic value of the property taken, to be made in

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1, Incipient proceedings may be had without compensation; 2, but must be followed up and compensation be made; 3, or trespass will lie.

money, and such was the view of the court in the case in the 23 Vermont 362.

In Maine, under their Constitution, which provides that "private property shall not be taken for public uses, without just compensation," it has been held, the Legislature having provided the means to be pursued to have compensation made for property taken for public use, may authorize an exclusive occupation of the property temporarily, as an incipient proceeding to the acquisition of a title to it, or to an easement in it; but that such incipient proceeding will be null and void unless it is followed up and completed within a reasonable time, and the party become liable to an action of trespass, if compensation be not made or tendered in a reasonable time from the commencement of the incipient proceedings. (*Cushman v. Smith*, 34 Maine 247.)

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The Constitution of Kentucky, guarantees a just compensation, to be made, before private property can be taken for public use, and it was held, that the owner was entitled to have the intrinsic value of the property, at least, paid him in money; although incidental damages beyond the intrinsic value of the land might be set off against incidental advantages. (*Rice v. Turnpike Co.*, 7 Dana 81; *Jacob v. Louisville*, 9 Dana 114; see also *the People v. Brooklyn*, 6 Barber 209.) Although it has been held in Ohio, that "benefits conferred upon property taken for public use, may be set off against its value." (*Brown v. Cincinnati*, 14 Ohio 541; *Symonds v. Cincinnati*, 14 Ohio 147.) And the same construction has been given the Constitution of Indiana, which provides that "just compensation shall be made for private property taken for public use." (*McIntire v. State*, 5 Blackford 384.)

Whether the payment of the compensation must precede the taking of private property for public use, must depend upon the construction to be given the language of the Constitution, or of the charter or law, under which it is taken. The bill of rights in Mississippi, restrained the right to take private property for public use, by requiring "a just compensation first to be made therefor;" and the court held, that a law authorizing a railroad company to take private property, without providing for such previous compensation was unconstitutional and void. (3 Howard, Mississippi 240; see also *Harrisburgh v. Craigle*, 3 Watts and Serg 460); so in *Stewart v. the Raymond Railroad Co.*, (7 Smead & Marshall 568),

it was held, that the land damages must be paid, before the right of way vests in the corporation.

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The Constitution of Wisconsin, art. 1st, sec. 13, requires a just compensation *first* to be made for the land taken, and it was held, that no entry upon the land to construct a railroad could be justified by force of law, until compensation had been in fact made, though an entry for exploration and location of a railroad may be justified, if the charter gives such a right even before compensation, and the measure of damages was held to be the fair value of the land, estimating the damages and benefits to the owner, exclusive of the expense of erecting and maintaining fences. (*The Milwaukee and Mississippi Railr. Co. v. Elbe* in error, 4 Chandler 72.)

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Where the charter provided, for the assessment of land damages, and that *security should be given for the same*, it was held, that no title would vest in the company, until the security had been given. (*Carr v. Georgia Railroad and Banking Co.*, 1 Kelly Georgia, 524) But it was held to be no objection to the constitutionality of a law, that it authorizes a railroad company to enter upon private property and make preliminary or final surveys before compensation is made, provided the act makes suitable provision for compensation, in case the land shall be eventually taken for such railroad. (*Polly v. S. & W. Railroad Co.*, 9 Barber 449. And in *Smith v. Hellman*, 7 Barber 416; and in *Pittsburgh v. Scott*, 1 Barr 309, it was held, that it was not necessary that the compensation should have been assessed and paid before the property could be actually appropriated to public use, but that it was sufficient, if an adequate remedy was provided, by means of which satisfaction could be obtained, without any unreasonable delay.

Although a railroad may have organized under the law, and have expended money in making their survey, maps and profiles, yet, if the law empowers the company to acquire a right of way, upon the legislature having approved of the route and terminations of the road proposed to be constructed, such approval is necessary before the company can proceed to condemn lands for the purpose of obtaining a right of way. (*Gillinwater v. the Mississippi and Atlantic Railroad Co.*, 13 Illinois 1.)

Where compensation has been made to an individual for land ta-

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ken for a street in a city, the city has the right to appropriate the land so taken to all such legitimate uses and servitudes, as custom and the public good require. (*Plant v. Long Island Railroad Co.*, 10 Barber 26.) And the legislature are not by the constitutional provision that private property shall not be taken for public use without compensation, restrained from granting to a railroad company the privilege of laying rails on the streets of a city or town, and using the railroad so made. (*Henry v. Pittsburgh and Alleghany Bridge Co.*, 8 W. & S. 87; *Mifflin v. R. R. Co.*, 4 Harris 192.) And the authority of the State, in respect to their general and more extended uses, is paramount. (*Philadelphia and Trenton Railroad*, 6 Wharton 25); and it is competent for the legislature to require of the railroad company, payment to be made, for consequential injuries to the landholders by way of additional damages. (*Mifflin v. Railroad*, 4 Harris 182.) And it is said by *Bell, J.*, page 193, that "it may now be taken as the ascertained rule, that the legislature may legally omit a provision for merely *consequential damages*, when creating a corporation to construct an improvement for the common benefit." Although such omission is not to be favored.

See also *Monongahala Navigation Co. v. Coons*, 6 Watts & S. 101, and *Radcliff v. Mayor of Brooklyn*, 4 Comstock 195, and *Hutch v. Vermont Central Railroad Co.*, 25 Vermont 49, where it was fully held, that the Legislature was not bound by the Constitution, to provide for the payment of consequential damages where lands were *merely injuriously affected*, for the reason that in such case, no private property was taken for public use, within the purview of the Constitution. See also *Keasy v. Louisville*, 4 Dana 154; and the grading of a street, or alley *already* dedicated to public use, is not an exercise of *eminent domain*, so as to require compensation to be made, if done skilfully and discreetly. (*Taylor v. City of St. Louis*, 14 Miss. 20.)

May recover for consequential damages, if the railroad charter will warrant it.

The charter of the New York and New Haven Railroad Co., provided, "that the company might enter upon and use all such real estate as should be necessary for them, and that they should be holden to pay all damages that should arise to any person or persons, and if the parties could not agree upon them, a committee was to assess just damages to the person or persons whose real estate had been taken or *injured*. It was held, that though a high em-

bankment had been made in front of the plaintiff's house, and a deep excavation for the bed of the railroad, in the land adjoining the plaintiff's, and so near his buildings as to injure them, still his property had not been taken for public use within the meaning of the Constitution of the State but that under the charter the plaintiff was entitled to compensation, and that as none had been made, the plaintiff could recover for such consequential damages, as he had sustained. (*Bradley v. New York & New Haven Railroad Co.*, 21 Conn. 294)

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Quære, Should not the remedy have been taken under the Charter, instead of an action at Common Law?

In a river that is navigable, in which the tide ebbs and flows, the land below high-water mark belongs to the people of the State in their sovereign capacity, and a Railroad Corporation being empowered by their charter to build a railroad from Albany to New York, raised an embankment for their railroad track between high and low-water mark on the margin of the Hudson River in front of and adjoining to the plaintiff's farm, forming a barrier to the passage of boats, &c., without his consent; and without making him any compensation for the injury done him, and it was held, the railroad company had the right to make the embankment. and that the plaintiff could sustain no action for damages. (*Gould v. Hudson River Railroad Co.*, 12 Barber 616.

The act of the Legislature of Mississippi, (1823,) vested in the city of Jackson the title to the streets within its limits; and it was held, the Legislature could not dispose of them, except for public use, and then only upon just compensation, and that the company could not have the right to run their road through the streets of the city, without the consent of the Corporation; or without the assessment and payment of damages according to law. (*Donna-hue v. State*, 8 Smead and Marshall 649.)

The city may, it was further held, regulate the mode of propelling the cars within its limits, whether by steam or horse power, and the rate of their speed. (*Ib.*)

Quære, whether the owners of lots adjoining the railroad track could claim compensation for damages. (*Ib.*)

Where a charter of a railroad company authorizes it to establish a railway along a public street to a particular point, and to run a locomotive on the road, the company will be entitled to make a

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turn out from the main track, to communicate with a depot, erected by them near the terminus of the road; containing the machinery necessary for reversing the engine, &c., where no objection exists to the turn-out at that particular point, subject however to the police power of the municipality, and constructed and used so as to interfere, as little as possible, with the free use of the public highway. (*New Orleans & Carrollton Railroad Co. v. Second Municipality*, 1 La. Ann. Rep. 128.)

Who are entitled to land damages; and who should be parties in their assessment and who not; and when they may be assessed.

It may be well to consider, who are entitled to land damages, and who should be made parties in their assessment, and when they may be assessed.

In the case of the land of one deceased being taken for a Railroad, it is held in Massachusetts that the heir, and not the administrator, is entitled to the damages for such taking, and that he should prosecute for the recovery, even though the estate had been previously represented insolvent, and the administrator afterwards obtained a license to sell the real estate for the payment of debts. (*Boynton v. Petersburg and Shirley Rail Road Company*, 4 Cushing 467.) But *Quere*, if the lands descend to the administrator as assets in the first instance, as in Vermont, the heir having no right to sustain ejectment or trespass until a distribution in the probate office, is not the right to damages at law vested in the administrator.

A tenant for life may have a proceeding for damages done to her estate, without joining the remainder man. (*Rail Road v. Boyer*, 13 Penn. 497.) But a tenant in common cannot have the damages assessed in his own name though he have authority from his co-tenant so to do, and the irregularity is not cured by the co-tenant afterwards granting a formal release. (*Rail Road v. Butcher*, 7 Watts 33.) In Massachusetts, where the damages sustained by a tenant for years had been assessed, and on appeal had been reversed by a jury on the petition of such tenant, and the verdict set aside by the court, and the case remanded to the County Commissioners, it is, it seems, competent for the Commissioners, on motion, to dismiss the petition for a jury and bring forward the original petition and summon in the reversioner to become a party thereto, and then proceed to estimate the whole damages, and apportion the same between the parties interested, and that if such

proceeding is objectionable, it can only be objected to by the lessee, and not by the Rail Road Company. (3 Cushing 58.)

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If flats appurtenant to, and incident to upland, are taken for a Rail Road, the Commonwealth has no interest therein by way of easement, which requires the damages for taking the same, to be assessed in the manner provided by the Revised Statutes of Massachusetts, Chap. 24, sec. 48, 49, 50, where there are several parties, having several estates, or interests, at the same time in the land. (*Walker v. Boston and Maine Rail Road Company*, 3 Cush. 1.)

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And if a purchaser of land deeds it back in trust to secure the purchase money he cannot grant a right of way over the land, except subject to the deed of trust; and hence it must follow, that if the land was taken by compulsory process by the Railroad Company, the person having the legal estate would be entitled to land damages. (See *Stewart v. Raymond Railroad Company*, 7 Smead and Marshall 568.)

But a mortgagee of land taken for a Railroad, need not be made a party to proceedings by the mortgagor for the assessment of damages, provided he gives his consent thereto by a writing filed in the case. (*Meacham v. Fitchburg Railroad Co.*, 4 Cushing 291.)

Where a railroad was located over lands held by the State as a body politic, for a particular purpose, but no design was expressed in the act on the part of the Legislature to aid the corporation in their undertaking, it will not be held that it was the intention of the Legislature to grant the lands of the Commonwealth, or any easement in them, to the corporation, without compensation, and the Commonwealth may have the same proceedings for the assessment of damages, as the law provides for individuals. (*The Commonwealth v. Boston and Maine Railroad Co.*, 3 Cushing 25.)

Commissioners may assess damages for the acts of a Railroad Company, when those acts are such as the corporation by their engineers, agents, or workmen, may rightfully perform by virtue of their charter, and it makes no difference whether the Corporation admit or deny their liability. (*Vermont Central Railroad Co. v. Baxter*, 22 Vermont 365.)

By an act to incorporate the Philadelphia, Germantown, and Norristown Railroad Company, it was made the duty of the Company to construct a sufficient causeway, wherever it should be

8 & 9 Vict. necessary, to enable the owner of land, through which the road
 c. 18. might pass, to cross over or under the road, and it was declared
 Sect. 68. they should be liable in an action for damages, to any person ag-
 grieved.

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The company laid out their road over the land of the plaintiff, so as to prevent his passage from one part of his farm to another, but they did not complete the road. By a supplementary act, they were authorized to change the route of the road and it was declared, that any person injured by the change of the route, might apply to the Court of Common Pleas for the appointment of men to assess the damages, &c.

Held also, that the supplementary act repealed the original act, so far as respected the remedy by action, and that the plaintiff could not maintain an action of trespass to recover damages, as at common law, but was confined to the remedy given by the supplement. (*Knoor v. Germantown Railroad Co.*, 5 Wharton 256.)

Of the assess-
 ment of dam-
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 costs are al-
 lowed.

In the assessment of land damages the plaintiff's title to the land is properly in issue, although upon exception to the inquisition, in the absence of proof on the subject, it will be presumed the jury decided correctly. (*Directors of the Poor v. Railroad Co.*, 7 Watts and Serg. 236. And in case the Commissioners should refuse to assess damages, on the ground that the party applying for them does not own the land, he is entitled to have their judgment revised by a jury. (*Carpenter v. Bristol*, 21 Pick. 258.) And where land has been condemned for the use of a Railroad, and the inquisition returned to and confirmed by the proper authority, the propriety of the condemnation, and the use of the property, cannot be drawn in question in an *incidental* or *collateral* proceeding. (*Hamilton v. Annapolis and Elk Ridge Railroad Co.*, 1 Maryland Chan. Decisions 107.

Where there is a special mode of ascertaining damages provided in a charter the general law relating to Railroads of 1850 in New York, it was held did not apply, and also that the company could change their route at any time before the Report of the Commissioners had been confirmed, and new Commissioners were appointed upon the Company's being ordered to pay the costs of the first Commission. (*Hudson River Railroad Co. v. Outwater*, 3 Sanford 689).

The damages assessed by County Commissioners under the Re- 8 & 9 Vict.
vised Statutes of Massachusetts, occasioned by the location and c. 18.
building of a Railroad, will be held to include injuries done by a Sect. 64.
Railroad Corporation to buildings near the line of the road, by the
blasting of a ledge of rocks in a proper manner, through which
the Railroad passes. (*Dodge v. Essex*, 3 Metcalf 380.) So [308]
the injury which may be done to the owners by destroying
all communication between parts of their land lying on opposite sides
of the track is to be included in the estimate of damages. (*Mason*
v. Kennebeck and Portland Railroad Co., 31 Maine 215.)

The land damages cannot be assessed with a reservation of
easements and *privileges* to the owner, as by giving him a right
to open a street across the railroad; and if so assessed, the inquisition
will be set aside, upon certiorari, as illegal. (*Hill v. Mohawk*
and Hudson Railroad Co., 5 Denio 206.)

And where County Commissioners in assessing damages for
land taken for a railroad before the act of 1841, (Chap. 125,) was
passed, awarded a sum of money to be paid the complainant, and
also provided that the proprietors of the road should make and
maintain certain fences for his benefit, and such complainant ap-
pealed from the award to a jury, who assessed damages in his fa-
vor but made no order in their verdict as to the fences; it was
held that the railroad company were under no obligation to make
and maintain fences, agreeably to the award of the Commissioners.
(*Morss v. Boston and Maine Railroad Co.*, 2 Cush. 536.)

Under the railroad law of Massachusetts, which gives a right
to recover consequential damages, the owner of a wharf which was
impaired in value by the construction of a railroad across the flats
below it, may recover damages thus sustained by him. (*Ashley v.*
Eastern Railroad Co., 5 Metcalf 368. The statute bar for
making application to the County Commissioners to assess land
damages begins to run from the filing the location of the road.
(*Charlestown Branch Railroad Co. v. County Commissioners*,
7 Metcalf 78.)

The assessment of damages may be void for uncertainty, as
where they are assessed at a certain sum, "with the interest there-
on from the time the railroad company took possession of the land;"
and the court have no power to alter or supply any defects in the
verdict. (*Connecticut River Railroad Co. v. Clapp*, 1 Cushing

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559.) The assessment of damages should be made complete by the Commissioners, as to all parties interested before the case is sent to a jury for a re-assessment. (*Fitchburgh Railroad Co. v. Boston and Maine Railroad Co.*, 3 Cushing, 58. And though the Revised Statutes of Massachusetts limit the time when the landholder may apply to the Commissioners for a jury to assess the damages to the time when the estimate is made and returned by the Commissioners, or to the next regular meeting thereafter, yet it was held not to limit the time in which the application must be acted on. (*Walker v. Boston and Maine Railroad Co.* 3, Cushing 1.)

Though the warrant issued for a jury need not be of any particular form, yet it should set out with sufficient certainty the land over which the road passes, the petitioner's interest in it, the location of the road and the incidental damages, if any, which the petitioner has sustained in addition to the value of the land taken; and this may be done by reciting the substance of the petition in the warrant, or annexing a copy of it to the warrant and referring to it. (*Walker v. Boston and Maine Railroad Co.*, 3 Cushing 1.

If the proceedings in the assessment of damages are in part by a Coroner, and in part by the Sheriff, each must certify the proceedings before him, and where the Coroner presides, it is no objection to the verdict that a Deputy Sheriff did not attend to the jury. (*Pittsfield and North Adams Railroad Co. v. Foster*, 1 Cush. 480.

The party claiming damages has the open and close. (*Conn. River Railroad Co. v. Clapp*, 1 Cush. 559.)

If the act of incorporation directs the Commissioners, in estimating damages to consider both the damages to the estate, and the benefit to it, and they make an award that they have considered the advantages and the disadvantages to the estate, and return a gross sum, the award will be held bad, it not conforming to the directions of the statute. (*Ohio and Pennsylvania Railroad Co. v. Wallace*, 14 Pennsylvania 245.) It was held in (*Harvey v. Lloyd*, 3 Barr 331,) that the enhancement of the value of the petitioner's land by the proposed Railway was not admissible in a proceeding to assess land damages. Where damages had been

assessed under the charter of the Pennsylvania Railroad Company, which required a report to be made to the Court, it was held the Court might set aside the report for mere excess of damages. and that the Supreme Court had the same power when the proceedings were brought up upon *certiorari*. The charter in that case provided "that if the report was not confirmed and *justice should seem to require it*, a new inquisition should be awarded by the Court. In such case a *procedendo* would not be awarded, but the parties must commence *de novo*." (See *Pennsylvania Railroad Co. v. Heister*, 8 Barr 445; also *same v. McClure*, and *same v. Reiley*, same vol. and page.) It is irregular for the Sheriff to select a jury from a list of names prepared by his deputy, to assess the damages. (8 Barr 445, *ante*.)

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Held further, in the same case, that the true rule in the assessment of damages was a just and fair compensation to the landowner, upon a comparison of the value of the whole tract through which the road passed, before and after the improvement. But under the charter of the Philadelphia and Southwark Railroad Companies, the Court cannot inquire into the merits of the assessment of the damages by the jury, nor set it aside on the mere ground of inadequacy or excessiveness of damages. (*Welsh v. Baltimore Railroad Co.*, 5 Wharton 460.)

Under the Act of the 2d April, 1831, incorporating the Philadelphia and Delaware Railroad, it was not made necessary for the jury to return a valuation of the land occupied, nor to give a description of the land taken for the Railroad, nor can they include claims for bridges. (*Philadelphia Railroad Co. v. Trimble*, 4 Wharton 47.)

Under the charter of the Philadelphia, Germantown and Norristown Railroad Co., if a report be made by view as ascertaining the damages to the landholder, and an appeal therefrom, and a verdict and judgment thereon, the company is bound to pay the amount fixed by the verdict and judgment before they can become seized in fee of the land. (*Levering v. Railr. Co.*, 8 Watts & S. 459.)

Pending the appeal, the Railroad Co. have a qualified right to enter upon and use the land in the meanwhile, and until the final result; but unless they pay the amount fixed by the verdict and judgment, the owner may have his ejectment to recover the land.

A special authority to take away a man's property against his will, must be *strictly pursued*, and must appear to be so upon the

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face of the order. And where a particular notice in writing is prescribed by the act, it is not sufficient to say, "upon proof of due notice having been given," but it should appear on the order what notice was given. (*Van Wickle v. Railroad Co.*, 2 Green 162.)

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Under the Charter of the Somerville and Easton Railroad Co., the land damages may be assessed before the location of the whole road is filed. It is sufficient, if the location is filed through the lands, where the application is made to have the damages assessed. (*Doughty v. Somerville and Easton Railroad Co.*, 1 New Jersey 142.)

Where Commissioners are to be appointed to assess the damages when the parties cannot agree, the affidavit of the engineer, describing the land required, and stating that the company cannot agree with the landholder is sufficient proof that they cannot agree, especially when the owner appears at the appointment, and does not object on that account. (*Ib.*)

Where a Railroad Charter gave authority to enter upon lands &c., for their road, and provided for the appraisal of the lands taken and materials, a warrant directing the Commissioners to examine and appraise said lands, and to assess the damages to be paid by the Company for the lands so required, pursuant to the statute referred to in the order was held sufficient. (*Ib.*)

In Vermont, under the Charter of the Vermont Central Railroad, which authorized an appeal from the assessment of land damages by the Commissioners appointed under the charter to the County Court, and provided that the decision of the County Court should be final in the matter; it was held, it did not entitle the party to have his damages assessed in the County Court by a jury. (*Gold v. Vermont Central Railroad Co.*, 19, Vt. 474.)

So it was further held, that an act of the Legislature subsequently passed, which provided, "that when it becomes necessary to assess damages, and no other provisions are made by law for such assessment, the same shall be assessed by a jury upon the application of either party," did not give the party a right to have such damages assessed by a jury upon an appeal to the County Court, for the reason that the charter by the general terms used in it, should be so construed, as to furnish a rule or mode of assessing damages upon an appeal, and the same was adopted that was in use in the case of common highways. (*Ib.*)

The 10th section of the Charter of the Vermont Central Rail- 8 & 9 VICT.
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road gave the Corporation power to construct their Railroad
across "any stream of water, water-course, road or way, when ne-
cessary," and it was held, that they might under this provision lo-
cate it across a turnpike road, as well as any other highway, mak-
ing proper compensation for it, and that the charter which provided
for the assessment of damages for lands taken for the railroad might
be fairly construed to apply to a case of that kind. (*White River
Turnpike Co. v. Vermont Central Railroad Co.*, 21 Vt. 590.)

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The appointment of freeholders to assess damages for lands taken
for the Hartford and New Haven Railroad under the charter of the
Company, cannot be revised upon a writ of error. (*Williams v.
Hartford and New Haven Railroad Co.*, 13 Con. 110.)

Where an appeal from the valuation of land damages had been
taken and carried to the Court of Common Pleas; it was held, to be
error in that court to order the warrant, and the proceedings under
it to be quashed. (*Little Miami Railr. Co. v. Perrin*, 16 Ohio 479.)

In the appointment of Commissioners to assess land damages,
the court act *ministerially* and can only look at the fitness of the
Commissioners, *ex parte*. (*Railroad Co.*, 2 Rich. S. C., 434.)

The Court, upon the appointment of Commissioners, cannot en-
quire into the necessity of taking the lands; of that, the company
are to judge. (*Ib.*)

The Company may change the location of the road, as convenience
or interest may require, and are not confined to the tract which it
had once selected for its road. (*Ib.*)

If, on the hearing before a jury for the assessment of damages
for land taken for a railroad, it is agreed by the parties that the
proprietors of the road shall make and maintain fences against the
owner of the land taken along the line of the road, such agreement
if valid, can only be enforced against the proprietors of the road
in an action by the party with whom it is made, and not by any
subsequent purchaser of the estate to which it relates. (*Morss v.
Boston & Maine Railroad Co.*, 2 Cush. 536.)

In proceeding under the 7th section of the Act to incorporate
the Elizabethtown and Somerville Railroad Co., it will not be error
that the notices of the appointment of Commissioners to value land
required by the company, are addressed separately to each of sev-
eral owners of undivided lands, and the land to be valued is describ-

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ed, as "his land," or that the notices of the time and place of meeting are given by and in the name of the company, instead of by and in the name of the Commissioners, or that that the company appoint the time and place of meeting, give due notice of the appointment, and the Commissioners meet at the time and place appointed. (*Ross v. E. & S. Railroad Co.*, 1 Spencer, 239)

Under the aforesaid Act, the Commissioners have nothing to do with the quantity of estate, or the interest each owner has in the land required. Their duty is to estimate the whole value of the land required, and to assess the damages to all the owners *jointly*, and the act does not require that there should be a separate commission to value the interest of each owner separately. (*Ib.*)

An agreement having been made between the Commonwealth and the Charlestown Branch Railroad Co., which provided, among other things, that upon certain conditions, the Commonwealth would authorize such Corporation to institute proceedings in the name of the Commonwealth against the Boston and Maine Railroad Company for the purpose of recovering all claims which the Commonwealth might have against the latter for laying out and constructing their road over the lands of the Commonwealth, the money receivable for such damages to be paid to the Treasurer of the Commonwealth, and by him retained until the performance by the Charlestown Branch Rail Road Co., of the covenants contained in the said agreement, and on their part to be performed: and the Commonwealth having given such authority, and proceedings having been instituted accordingly in the name of the Commonwealth by the Charlestown Branch Railroad Company, against the Boston and Maine Railroad Co., for the recovery of such damages. It was held, that the contract was not illegal, that the case was one in which the Commonwealth was a party and interested, and that the damages were not limited to the amount to which the Commonwealth was entitled at the time of making the agreement, but were recoverable as of the time of filing the location of the Railroad. (*Commonwealth v. B. & M. Railroad Co.*, 3 Cush. 25)

If the proceedings of County Commissioners, in estimating damages for lands taken for a Railroad are *irregular*, the remedy is to be sought by an application to the Sup. Court for a *certiorari*, and not by an application to the Commissioners for a jury to re-

wise the damages. If the latter course is adopted, it is an admission that the previous proceedings were regular and a waiver of exceptions thereto. (*Fitchburgh Railroad Co. v. Boston and Maine Railroad Co.*, 3 Cush. 58.)

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Where one gives a Railroad Co. verbal permission to use his land, he cannot recover damages for such use, as long as the permission remains unrevoked. (*Miller v. Auburn Railroad Co.*, 6 Hill 61.)

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Any technical departure from established rules in the admission or rejection of evidence cannot be allowed to affect the appraisal of land damages, unless it appears that such error has injuriously affected the party appealing. (*Troy & Boston Railroad Co.*, 13 Barber 169.)

If the Commissioners have not erred in the principles upon which they have made their appraisal, no other error will be sufficient to send the report back for a review. (*Ib.*)

In making the appraisal under the General Railroad Act of New York, 1850, the true rule is to determine what will be the effect of the proposed change upon the market value of the property. The proper inquiry is, what is the property now fairly worth in market, and what will it be worth when the improvement is made. (*Ib.*)

No person can object to the location of a Railroad on account of damage to his property, who had no interest in the property at the time the road was located. (*Hentz v. Long Island Railroad Co.*, 13 Barber 646.)

When a Railroad has been completed and put in operation, a landholder who has received no compensation for his land will not be permitted to have his injunction against the running of the cars, until he can coerce the payment of exorbitant damages, or go through the dilatory process of having the damages assessed in pursuance of the statute. All the ordinary means of obtaining an indemnity must have first failed. (*Ib.*)

On an appeal to the Supreme Court from an adjudication of the Court of Common Pleas, accepting the verdict of a Sheriff's jury, assessing damages for land taken for a Railroad, it being objected by the respondents that the Board of County Commissioners, when making an estimate of damages in the first instance, was not duly constituted, and the ground of this objection appearing only on the record of the proceedings, before the Commissioners, a copy

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of which was among the papers in the case. It was held, that this objection, was not open upon the appeal, and that, if well founded originally, the respondents had waived it by proceeding before Commissioners. (*Fitchburgh Railroad Co. v. Boston and Maine Railroad Co.*, 3 Cush.)

[308] Objections to the proceedings, before a sheriff's jury to assess damages for land taken for a Highway or Railroad, that the respondent had no notice of the application to the Commissioners for a jury, or that three disinterested Commissioners were not present as required, by the Statute, or that there were other cases of the kind which ought to have gone to the same jury, cannot be taken advantage of on appeal, unless the ground of such objections appear on the record, and it is not enough that it does not appear by the record that the party had notice, or that the business was determined by disinterested Commissioners, or by consent, or that there were other like cases put to the same jury. (*Walker v. Boston and Maine Railroad Co.*, 3 Cush. 1.)

County Commissioners having awarded damages for land taken for a Railroad, and the respondents having had their estimate revised by a jury, who also awarded damages, and the verdict of the jury having been accepted by the Court of Common Pleas, it was held, on appeal to the Supreme Court, that the question was open whether any damages could be assessed against the respondents. (*The Commonwealth v. Boston & Maine Railroad Co.*, 3 Cush. 25.)

The want of proper parties to a proceeding before a Sheriff's jury for the assessment of damages for lands taken for a Highway or Railroad, must be made an objection before the Commissioners upon the application for such jury. (*Meacham v. Fitchburgh Railroad Co.*, 4 Cush. 291.)

On an appeal to the Supreme Court, from a judgment of the Court of Common Pleas, accepting the verdict of a Sheriff's jury, impanelled to revise the estimate of County Commissioners, on an application for damages occasioned by the laying out of a Highway, it cannot be objected, that the Commissioners had no jurisdiction, because the parties had agreed to refer the damages to arbitration, and that the only proper place to urge that objection, was before the Commissioners; as a ground why a jury should not have been

ordered. (*Field v. Vermont and Massachusetts Railroad Co.*, 4 8 & 9 VICT
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The time at, and from which, the benefit accruing to the owner of land taken for a highway or Railroad, is to be estimated in assessing his damages for such taking, is that of the actual location.

(*Id.*)

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In an action of trespass against a Railroad Company, for breaking and entering the plaintiff's close, where the defendants justify under and by virtue of their charter, on the ground that the land in question was necessary for the construction of their railroad; and that the defendants by their agents, surveyors, and engineers, entered for the purpose of making surveys, and an averment in the plea that there was a disagreement between the plaintiff and the defendants, as to the price of the land, and that while such disagreement existed, T. McLean, first Judge, on the petition of the defendants in writing, duly issued, and delivered his warrant, &c, is a sufficient averment of the presenting a petition; nor is it necessary in a plea to set out the names and places of abode of the twelve Jurors, drawn for the purpose of appraising the value of land taken for a railroad. It is sufficient to mention the names of those who were actually sworn. (*Polly v. Saratoga and Washington Railroad Co.*, 9 Barbour, Sup. Ct. 449.)

Where proceedings for the appraisal of damages for land taken by a Railroad Corporation were commenced before the first judge of the Court of Common Pleas, whose office was then abrogated by a change of the organic law, and a County Judge was elected in his place under the new Constitution; it was held that such proceedings might be continued and completed before such County Judge. (*Id.*)

Where the Court of Common Pleas set aside a verdict of a jury summoned to re-assess damages for land taken for a railroad, they have no authority to award costs to the party objecting to the verdict. (*Connecticut River Railroad Co. v. Clapp*, 1 Cush. 559.)

Where the estimate of the petitioner's damages occasioned by the construction of a Railroad as made by the County Commissioners is revised by a Jury on the application of the respondents, and the amount reduced, and the verdict of the Jury on appeal to the Supreme Court from the adjudication of the Common Pleas accepting the same, is established by the Sup. Court, neither party is

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Sect. 68. liable to the other for the costs of the proceedings before the sheriff and jury. but the petitioner is entitled to recover against the respondents the taxable costs of the appeal. (*Commonwealth v. Boston and Maine Railroad Co.*, 3 Cush. 25.)

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Of the appointment of Commissioners and notice of their appointment; and of notice for the assessment of damages. A provision in a Railroad charter to ascertain, by Commissioners, the value of the lands taken, and vesting the lands in the Company upon the tender of such assessment, although an appeal is given from such assessment to a Jury, does not render the appointment of such Commissioners unconstitutional. (*Doughty v. Somerville and Easton Railroad Co.*, 1 New Jersey 442.)

The notice of the time and place of the appointment of Commissioners to assess land damages under the charter of the foregoing railroad company, need not contain a description of the land to be taken. (*Id*)

Where Railroad Commissioners act *judicially*, all must be present; a majority may decide. Otherwise if they act *ministerially*. (*Crocker v. Crane*, 21 Wind. 211.)

But on an application by the Morris and Essex Railroad Company, for the appointment of Commissioners to assess the value of lands taken by them for their Railroad, the application should be in writing, and should distinctly show the location and the quantity of the land to be valued; the owner should be apprised of the same; the route over these lands must have been determined upon, and the survey thereof filed in the office of the Secretary of State before the proceedings were instituted; it should appear upon the face of the proceedings, that the Company and the landowner were unable to agree for the price of the land, and there should be a clear and intelligible description of the land, and of its situation and boundaries in writing, under the hands and seals of the Commissioners, transmitted to the Judge, and by him filed in the Clerk's office in the County; otherwise the proceedings will be set aside *on certiorari*. (*Vail v. Morris and Essex Railroad Co.*, 1 New Jersey 189.)

When an application is made to the County Commissioners for an assessment of damages for lands taken for a Railroad, the party against whom the application is made is entitled to notice thereof from the County Commissioners, but in order that *want of notice* may be taken advantage of on an appeal, the record must show that the party did not have due notice of the pendency of the petition be-

fore the warrant issued, and it is not sufficient that no averment appears on the record that notice was given, there being no occasion in the proceeding before Commissioners that the giving of such notice should so appear. (*Walker v. Boston and Maine Railroad Co.*, 3 Cush. 1.)

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Proceedings for the appraisal of damages commenced before the first judge of a Court of Common Pleas was directed by him to be transferred to the County Judge, on one day's notice being given to the owner of the land; and the landowner subsequently appeared before the County Judge, without raising the question, that he had not had notice of the transfer. Held, that such appearance by him, such notice being for his benefit, was a waiver of a want of it. (*Polly v. Saratoga and Washington Railroad Co.*, 9 Barbour, Sup. Ct. 449.)

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The Charter of a Railroad Company directed, that in case of a disagreement between the Company and the owner of any land taken for the construction of the road, as to the value of the land, upon the presenting a petition to a Judge, the latter should direct the Sheriff to give public notice in at least one newspaper printed in the County, that on a specified day he would, together with the County Clerk, at the Clerk's office proceed to draw a jury to appraise the damages of the owners of the land. Held, that this was all the notice of drawing the Jury which the owner was entitled to, and that a written notice was not required to be served on him. (*Polly v. Saratoga and Washington Railroad Co.*, 9 Barbour, Sup. Ct. 449.)

Of the appointment and summoning a jury to assess damages and notice of drawing a jury.

The charter also provided that in case of a disagreement between the company and the owner of any land taken as to the value of the land, twelve persons should be summoned, six of whom should be drawn to form a Jury for the appraisal of the value of such land. Held, that it was sufficient if the Sheriff summoned all of the twelve who were in life, and within his jurisdiction, and six could be taken by lot from that number, free from exceptions, and that a return by the Sheriff as to one, that he was a non-resident of the County, was a sufficient excuse for not summoning him (*Ib.*)

The "three nearest towns not interested" from which Jurors are to be taken to estimate damages caused by the laying out of a Highway or Railroad, are the three towns nearest to and exclusive of the town in which the land lies over which the Highway or Railroad is laid. (*Meacham v. Fitchburgh Railroad Co.*, 4 Cush. 291; *Wy-*

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man v Lexington & West Cambridge Railr. Co., 13 Metcalf 316.)

A Sheriff's Jury to assess damages for land taken for a Highway or Railroad may be summoned by the several Constables of the several towns whence they are taken, or partly by such Constables and partly by the Deputy Sheriff, by whom the warrant is executed. (*Id.*)

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Under the Revised Statutes of Massachusetts, chap. 39, sec. 57, which provide that a party who is dissatisfied with the estimate made by the County Commissioners, of damages caused by taking land for a railroad "may apply for a jury to assess the damages either at the same meeting at which such estimate shall be completed and returned, or at the next regular meeting thereafter." If a party applies for a Jury at the same meeting at which the estimate is completed and recorded, and a Jury is then ordered and a warrant therefor issued, he cannot by merely omitting or refusing to proceed under that order and warrant, entitle himself to a Jury on applying therefor at the next regular meeting of the Commissioners. (*Taylor v. County Commissioners*, 13 Met. 449.)

Though an original petition for a Jury to assess damages caused by the taking of land for a Railroad is not seasonably filed, if it be after the regular meeting of the County Commissioners next following that at which they completed and returned their estimate of such damages; yet, if such prohibition be filed at the same meeting at which they completed and returned such estimate and they thereupon without notice to the Railroad Corporation pass an order and issue a warrant for summoning a Jury, and the warrant is not served, they are authorized and ought upon notice of the landowner, though the motion be not made until after their next regular meeting to issue an order of notice to the Railroad Corporation to show cause why a Jury should not be summoned on the original petition, the first order for a Jury being void for the want of such notice, and the original petition being still pending. (*Porter v. County Commissioners*, 13 Met. 479.)

Of evidence
on the assess-
ment of land-
damages;
what admis-
sible and
what not.

On the hearing before a Jury to assess damages caused by laying out a Railroad, evidence may be given of the price paid by the Railroad Company for the adjoining land of B., purchased by them; but the owner of adjoining land cannot be permitted to state to the Jury, what in his judgment is the value of that land, though a farmer who has occasionally bought and sold land—and if he is permitted to make such statement, the verdict of the Jury will be set aside, although they were instructed that opinions, except of

expartes, were not evidence, and that the facts or reasons upon which any opinion or judgment was formed, were the evidence upon which they must form their opinion. (*Lyman v. Lexington and West Cambridge Railroad Company*, 13 Metcalf 316.)

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But evidence is not admissible to show the price paid by the Railroad Company for land adjoining the land in question, under an award of arbitrators, mutually agreed upon to estimate the same. (*White v. Fitchburgh Railroad Company*, 4 Cushing 440.)

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In estimating the damages, any *direct* and *peculiar* benefit or increase of value, accruing from the Railroad, to land of the same owner, adjoining or connected with the land taken and forming part of the same parcel or tract, is to be considered by the Jury, and allowed by way of set off, but not any general benefit or increase of value received by such land in common with other lands in the neighborhood, nor any benefit to other lands of the same owner, though in the same town. (*Meacham v. Fitchburgh Railroad Company*, 4 Cush. 291.)

An estimate, not on oath, of damages which would be sustained by a party, over whose land a Railroad was afterwards laid out, made by a committee of a town while a petition of the town for a change in the route of the Railroad was before the Legislature, and merely stating those damages as the least which the party would take, is *not admissible in evidence*, to a Jury called to assess the damages caused by laying out a Railroad over it, although such estimate was made at the request of an agent of a Railroad Company. (*Webber v. Eastern Railroad Company*, 2 Met. 147.)

A witness who had been ten years a Secretary of an Insurance Company, and as such had been in the practice of examining buildings with reference to the insurance thereof, and who had also, as County Commissioner, frequently estimated damages caused to estates by laying out Highways and Railroads over them, was held to have been rightly permitted to give his opinion to a Jury on a hearing for the assessment of damages for land taken for a Railroad, that the passage of locomotive engines within one hundred feet of a building, would diminish the rent and increase the rate of insurance thereof against fire. (*Webber v. Eastern Railroad Company*, 2 Met. 147.)

But a duly attested copy of the report and estimate of the County Commissioners on an application for damages occasioned by taking

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the petitioner's land for a Railway, estimating the petitioner's damages, and also directing the respondents to make and maintain a way therein described for the benefit of the petitioner, is admissible in evidence for the respondents on a hearing before a Sheriff's Jury to estimate the damages. (*White v. Boston and Providence Railroad Company*, 6 Cushing 420. See also *Chapin v. Boston and Providence Railroad Company*, 6 Cushing 422.)

On a proceeding before a Sheriff's Jury, instituted by the Fitchburgh Railroad Co., for the recovery of damages occasioned by the laying out and the construction of the Boston and Maine Railroad over the land, wharves and flats of the former, the respondents introduced a letter signed by the President of the petitioners, and addressed to the President of the respondents, dated the 10th day of August 1844, in the following terms: "The Committee of the Directors of the F. R. Company have considered your application for a part of the flats of this Company in C. for your Corporation, and have come to the conclusion that they are not prepared to dispose of any of said flats, or at this time to name any price for what the law allows you to take for your road; but that you can go on and lay the sea-wall, as you propose, and fill up a sufficient width for your track, and settle all damages with James Gould, at your expense; and the whole matter shall be settled on equitable terms hereafter. P. S. It is understood that the wall and filling up is to be considered as above." And it was in evidence that the respondents had subsequently built a road, and a wall as alluded to in the letter. It was held that such letter and subsequent proceedings, did not prove any contract or agreement between the parties relative to the subject matter thereof. (*Fitchburgh Railroad Co., v. Boston and Maine Railroad Co.*, 3 Cush. 58.)

It has been held in New Jersey, that where damages to an estate by the construction of a Railroad are under amendment by a Jury, they are to take into consideration, the injury to the lands not taken, to the owner's dwelling-house on the estate, the subjection of his family to danger, his buildings to the risk of fire, the inconvenience caused by embankments and excavations, and the deterioration of his lands for agricultural purposes or for building lots; and consequently, evidence bearing upon these points is pertinent. *Ogden, J.*, dissenting as to the danger of family and risk of fire. (*Somerville and Easton Railroad Co. v. Doughty*, 2 New Jersey 595.)

In estimating the value of land taken, the present value of the lands, not at a forced sale, but at a sale which a prudent holder would make, if he had power of election as to time and terms, is to govern. It is proper to regard the location of the land, and the probabilities which a prudent man would entertain of the increased value of the property for building purposes. (*Ib.*)

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It is not competent, in order to rebut the opinion of witnesses as to the value of land taken for a Railroad, to show that in other towns lands had been increased in value by the proximity of the road. (*Ib.*, Ogden, J., dissenting.)

In Alabama, a witness cannot state his opinion as to the amount of damage sustained. (*The Montgomery and West Point Rail Road Company v. Varner*, 19 Alabama 185.)

In *Mason v. Kennebec and Portland Railroad Co.*, 31 Maine 215, it was held, that the remedy provided in the charter for the landholder to recover his damages for the location and construction of the Railroad across his land was *exclusive*, and that no remedy could be had as at the Common Law.

Is the summary remedy given by statute for the assessment of land damages, *exclusive*? and is the *assessment* final upon the merits, if unappealed from?

Though a different doctrine has sometimes been held, and although the case of *Carr v the Georgia Railroad Co.*, Kelly 524, is directly in conflict with the case in Maine, yet we apprehend there is little doubt of the soundness of the decision in Maine. The Common Law makes no provision for giving a compensation for the taking of private property for public use, and it is a common principle that where a statute introduces a new law directing a thing to be done in a particular manner, the thing can be done *only* in that manner, even though there are no negative words in the statute.

If lawful authority is given to take private property for public use, and that authority is pursued, there is no wrong done to the landholder of which he can complain, for his property has been taken according to the law of the land, and he receives his compensation in the manner the law has prescribed, and in effect it becomes a compulsory sale. The obligation is a statute obligation, and the remedy is a statute remedy, and in such case a remedy at Common Law will not be superadded. The authorities are very ample to show that persons acting under powers given them by statute in the execution of a public trust cannot be held guilty of a tort so long as they keep within their powers. The *Plate Man-*

8 & 9 VICT. *Manufacturers v. Meredith*, 4 Term 794, may well be considered a leading case upon this point. (See also *Sutton v. Clarke*, 6 Taunton 29; *Bolton v. Crouther*, 2 Barnewall and Creswell; *Stevens v. Middlesex Canal Co.*, 16 Massachusetts 466; *Piscataqua Bridge v. New Hampshire Bridge*, 7 New Hampshire 35; *Aldrich v. Cheshire Railroad Co.*, 1 Foster 359; *Boroughs v. Housatonic Railroad Co.*, 15 Conn. 124; *Hatch v. Vermont Central Railroad Co.*, 25 Vt. 49.)

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In this latter case which contains a full review of the authorities, it was decided that no action could be maintained upon common law principles to recover damages for the construction of a Railroad in a proper manner, which occasioned consequential damage to the plaintiff's premises and the same principle was adopted in *Richardson et al v. Vermont Central Railroad*, 25 Vt. 465.

Railroad Corporations act by a delegated authority from the sovereign power of the State, in their right of eminent domain; and so far as this question is concerned they are the agents of the public for the execution of public works which are calculated to subserve the interests of the body politic.

In *Knoor v. Germantown Railroad Co.*, 5 Wharton 256, the party was confined to the remedy given by statute, and not allowed to maintain an action at Common Law.

So in Indiana it is held, that where private property is taken for public use, and a mode of compensation is specifically prescribed, such compensation must be sought in the manner so prescribed, and not otherwise. (*Kimble v. White Water Valley Canal*, 1 Carter, Indiana 285.)

In such cases the statute remedy is co-extensive with the injury, and when this is the case, it is but reasonable to confine the party to the statute remedy. It is however apparent, that this principle cannot be extended so far as to bar an action at Common Law to recover damages which result from a neglect of duty. (See *Dean v. the Sullivan Railroad Co.*, 2 Foster, N. H. 316; *the Mayor of Litchfield v. Simpson*, 8 Adolphus & Ellis N. S. 65; *Furniss v. the Hudson River Railroad Co.*, 5 Sanford 551.)

In *Aldrich v. Cheshire Railroad Company* 1 Foster N. H. 359, it is expressly held, that the assessment of damages by Commissioners, to a landholder whose land has been taken for a Railroad, is not a *cumulative* remedy, but is a substitution of one mode for

another, and that the decision of the Commissioners on the merits is conclusive and final, subject only to the right of appeal.

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This was a very strong case for the relaxation of the rule, if the law would have tolerated it. The plaintiff's buildings were supplied with water from a spring. The damages were assessed before any excavations had been made, and subsequently the spring was cut off by the excavations, and yet the Court say that the injury to the spring, it must be presumed, was considered by the Commissioners, and that an action for the injury to it could not be sustained. So in *Furniss v. The Hudson River Railr. Co.*, 5 Sanford 551, it was held that where all the proceedings were regular in assessing damages for lands taken or injuriously affected, it will be presumed the assessments embraced all damages naturally following or that should be caused by the proper construction of the Railroad, and such proceedings were held a bar to any action for damages.

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So in the recent case of *Butman v. Vermont Central Railroad Co.*, decided by the Supreme Court of Vermont in 1854, not yet reported, the damages were assessed by the Commissioners under a bona fide representation, by the agents of the Railroad Company, that the road across the plaintiff's land would be constructed with a given fill or embankment; but when it was constructed, the fill was greater; and yet the Court held the assessment, unappealed from, was conclusive. See also *Baltimore and Susquehannah Railroad Co. v. Compton*, 2 Gill. 20; *H. Milton v. Annapolis and Elk Ridge Railroad Co.*, 1 Maryland 553 *Railroad Co. v. Yeisor*, 8 Barr. 366.

In New Jersey an award by Commissioners appointed to assess Railroad damages, assessing damages for running, making and maintaining fences, without showing that the lands through which the road was run are improved lands, is *illegal* and *void*, the charter authorizing such damages only in the case of improved lands. (*New Jersey Railroad v. Suydam*, 2 Harr. 25.)

When will
the assessment
of damages
be set aside ?

If the Commissioners acted upon illegal principles in assessing damages, their award will be set aside. (*Ib.*)

The Supreme Court cannot determine the amount of damages on the merits, where the Commissioners assessed the damages on the right principle. (*Ib.*)

As to what circumstances amount to "good cause," in the language of the act incorporating Camden and Amboy Railroad Co.,

8 & 9 VICT. c 18. to set aside the report of Commissioners on the application of the
Sect. 68. landholder. (See *Burnett v. Railroad*, 2 Green 145; *Van Winkle v. Railroad*, 2 Green 162.)

[308] Under the Act of March 22, 1839, incorporating the Trenton Railroad, it was held to be no valid objection to proceedings locating the road, that the location was made by the Jury, and that there were not two full terms, between the appointment of the Jury and the confirmation of their report. (*Philadelphia and Trenton Railroad*, 6 Wharton 25.)

What are objections to a Juror. and when to be taken ? Under the New York Act of 1836, p. 365, sec. 7, it is no objection to the competency of a Juror to assess damages on a Railroad that he has been an appraiser on another Railroad in the same County, and holds stock therein. (*The People v. First Judge of Columbia*, 2 Hill 398.)

An adjournment in such case by the Judge for three days after the Jury had been regularly drawn for the purpose of supplying vacancies, if any of those drawn should be unable to serve, and the supplying the places of two who were unable to attend was held regular. (*Ib.*)

If some of the Jurors summoned on a Sheriff's Jury to assess damages for land taken for a Railroad, are drawn from the town in which the land lies, this is an objection to those Jurors only and not to the others, and must be taken when the Jury are empaneled, in which case the Sheriff may set aside the Jurors so disqualified and fill their places with others; but if the respondent proceed to trial without taking the exception, it will be *waived*, and cannot be afterwards taken on appeal to the Supreme Court. (*Walker v. Boston and Maine Railroad Co.*, 3 Cush. 1; see *Davidson v. Same*, 3 Cush. 91.)

The same Jurors being summoned to assess damages severally sustained by two Railroad Companies, for the taking of their lands lying contiguous to each other by a third Railroad Company for the road of the latter; it was held to be no objection to the competency of one of the jurors to sit in the cause first tried, that he was a stockholder in the other Company petitioning, whose cause was to be tried immediately afterwards. (*Commonwealth v. Boston and Maine Railroad Co.*, 3 Cush. 25.)

In the case of *Peavey v. The Calais Railroad Co.*, 30 Maine 498, it was held the Corporation could take no lands for the extension of their Railroad, except by the consent of the owner, after the time had expired within which the Company were, by their charter, to have completed their road. This position must be quite evident; but suppose the time has not expired by the charter, but the Company have once exercised their powers under their charter by a location of their road; can they afterwards abandon their location which has been once adopted, and select and locate their road upon a more favorable route? In *Moorehead v. The Little Miami Railroad Co.*, 17 Ohio 340, it was held that when a Railroad Company had once exercised their right to take land for their Railroad, their powers were exhausted and could not be again restored except by act of Legislation, and that even a power given in the charter to change the location, during the progress of the work, does not, by implication, give a power to change it after the road has been completed. In *Blakenmore v. The Glamorganshire Canal Co.*, 1 Mylne and Keen 154, the principle was fully adopted that when the Company had once completed their canal, their powers were exhausted, and that they could not subsequently enlarge their canal, the effect of which would be to draw off a portion of the water used by the manufacturing establishment; and it was denied by Lord Eldon that a power to improve the canal gave any power to effect a radical change in the work, by enlarging it.

The principle of that case was fully adopted by the Court of Exchequer, in an action at law to recover damages of the Company, which the plaintiff had sustained previous to the granting of the injunction, and the principle affirmed in the House of Lords. See 3 Y. & Jero. 60. 1 Clark & Finnelly 262.

The Constitution of New Jersey (1844,) provided that "private property should not be taken for public use without just compensation," and the Court held that compensation must be made before the land could be taken for a Railroad. (*Doughty v. the Somerville and Easton Railroad Co.*, 3 Halsted, in Chancery 51; although under the first Constitution of Indiana, it was held the compensation need not precede the taking of the property. (*McCormick v. Lafayette*, 1 Carter 48.)

But in the Constitution of 1851, it is expressly provided, that "no

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When are the powers of a Railroad Company to take lands under their charter at an end?

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When the land damages must be paid, and what is the effect of such payment, and of the right thereby acquired.

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man's property shall be taken by law without just compensation," and except in the case of the State, it requires compensation to be *first assessed and tendered*. (Article 1st, section 21st.)

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The language of the first Constitution of Indiana was, that "no man's property could be applied to public use without just compensation being made therefor." (Article 1st., section 7th)

So in Mississippi the land damages it was held, must be paid or tendered before the Railroad Company could exclude the owner from exercising full dominion over his land, and a Court of Equity will restrain the Company from using the land until the damages have been paid or tendered. (7 Smead & Marshall, 568.) But their Constitution is explicit, in requiring the compensation *to be first made therefor*. (See article 1, section 13.)

In Pennsylvania it was held, that under the act of 1829, section 15, where land damages had been awarded and paid in money, the Corporation were the owners of the land, although a *certiorari* had issued to remove the proceedings to the Supreme Court. (*Schuler v. Northern Railroad Co.*, 3 Wheaton 555)

The acceptance of a certificate of deposit made by the Cashier of the Railroad Company by the vendor of the land for the purchase money, is not a waiver of his *lien* upon the land. (*Mines v. Macon and Western Railroad Co.*, 3 Kelly 333.)

Under the 25th section of the Railroad Law, Comp. Statutes of Vermont, p. 196, which in case of conflicting claims, provided for the deposit of the land damages by the Railroad Company under the order of the Chancellor, with the Clerk of the Court or in some Bank in the County, subject to the future order of the Chancellor; it was held, that the statute contemplated that the proceedings before the Chancellor in regard to what claimant the money should be awarded, should be summary and final, and that upon a hearing before the Chancellor upon the application of a claimant, the Railroad Company had no interest, and could not appeal from the order of the Chancellor. (*Haswell v. Vermont Central Railroad Co.*, 23 Vermont 228.)

If a Railroad Company have pursued the Statute, prescribing the mode of obtaining a right of way for their Road, their right is perfect, though the landholder shall obstinately refuse to accept the money awarded him. (*Montgomery and West Point Railroad Co.*, 14 Alabama 207.)

An act incorporating a Railroad Company declared, that after the assessment and payment of the damages for the land to be used for the Road, the Company may enter upon the said land, &c., "and hold the said land to their own use and benefit, for the purpose of preserving and keeping said Railroad during their corporate existence, (sixty years,) and in all things to have the same power over the land during their corporate existence, as though they owned the fee simple in the land.

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c 18.
Sect. 69.

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Held first, that under this clause the Corporation, after the assessment and the payment of the damages, became tenant of the land as the owner of the legal estate for the term of sixty years subject to the earlier determination of the Corporation for any cause. Secondly, that the provision that said Company "shall hold the said land for the purpose of preserving and keeping up the Road," was not a condition precedent upon the performance of which their estate depended, but only assigned the reason why the law vested the estate in the Corporation. Thirdly, that from the nature of things *that an estate* must be vested in the Corporation in the land taken for the Railroad, unless it is clear that the contrary was intended. And fourthly, that only the real estate which remains in a Corporation at the time of its dissolution reverts to the original proprietors, and that what has been divested out of the Corporation by its own act or the act of law, does not so revert. (*State v. Rives*, 5 Iredell 297.)

Application of Compensation.

And with respect to the purchase money or compensation *coming to parties having limited interests, or prevented from treating, or not making title, be it enacted as follows :

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LXIX. If the purchase money or compensation which shall be payable in respect of any lands, or any interests therein, purchased or taken by the promoters of the undertaking from any corporation, tenant for life or in tail, married woman seised in her own right or entitled to dower, guardian, committee of lunatic or idiot, trustee, executor, or administrator, or person having a partial or qualified interest only in such lands, and not entitled to sell or convey the same except under the provisions of this or the special act,

Purchase money payable to parties under disability amounting to 200*l* to be deposited in the bank.

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c. 18.
Sect. 69. or the compensation to be paid for any permanent damage to any such lands, amount to or exceed the sum of two hundred pounds, the same shall be paid into the bank, in the name and with the privity of the accountant general of the Court of Chancery in England if the same relates to lands in England or Wales, or the accountant general of the Court of Exchequer in Ireland, if the same relates to lands in Ireland, to be placed to the account there of such accountant general, ex parte the promoters of the undertaking (describing them by their proper name), in the matter of the special act (citing it), pursuant to the method prescribed by any act for the time being in force for regulating monies paid into the said courts; and such monies shall remain so deposited until the same be applied to some one or more of the following purposes; (that is to say,)

Application
of monies.
deposited.

In the purchase or redemption of the land tax, or the discharge of any debt or incumbrance affecting the land in respect of which such money shall have been paid, or affecting other lands settled therewith to the same or the like uses, trusts, or purposes, or (*r*)

In the purchase of other lands (*s*), to be conveyed, limited, and settled upon the like uses, trusts and purposes, and in the same manner, as the lands in respect of which such money shall have been paid stood settled; or

If such money shall be paid in respect of any buildings taken under the authority of this or the special act, or injured by the proximity of the works in removing or replacing such buildings, or substituting others in their stead, in such manner as the Court of Chancery shall direct; or

[*310] *In payment to any party becoming absolutely entitled to such money (*t*).

(*r*) All the lands of a municipal corporation are held upon the same or the like uses, trusts or purposes within this section, so that money paid for the compulsory purchase of one part of the lands of a municipal corporation may be applied in the redemption of an incumbrance upon another part of the lands of the same corporation. (*Ex parte Corporation of Cambridge, In re Eastern Counties Railw. Co.*, 6 Hare, 30; 5 Railw. C. 204.)

Where money had been paid into court under this section, ^{8 & 9 VICT.}
^{C. 18}
^{Sec 69.}
 the company were ordered to pay interest up to the time of
 the investment, upon the ground of having acquiesced in
 the vendor's demand, although the court entertained some
 doubt whether they were doing quite right in exercising
 jurisdiction upon the subject, even by the consent of parties.
 (*Ex parte Earl of Hardwicke Re Royston and Hitchin*
Railw. Act, 1 De G. M. & G. 297. See *Chambers v.*
White, 14 Jur. 1129.) It was held, in another case, that
 the interest ceased from the time of the payment of the pur-
 chase money into the bank. (*Lewis v. South Wales Railw.*
Co., 22 Law J. Ch. 209.)

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Purchase money had been paid into court by a railway
 company in the usual manner under this act; and the parties
 interested in the money wishing to purchase another piece of
 land, a reference had been made to the master as to whether it
 would be a proper purchase. The master had refused to cer-
 tify that it was so, but it did not appear on what ground.
 On application for payment of the money out of court,
 the costs of the former application and reference were or-
 dered to come out of the fund. (*Ex parte Stevens*, 15 Jur.
 243.)

A railway company took land which was settled on A. B.
 for life, with remainders over. The purchase money was
 paid into court. An agreement for investing this sum, with
 the exception of 30*l.*, in the purchase of other land, was ap-
 proved by the master. It was ordered that the 30*l.* should
 be paid to A. B., he undertaking to lay it out in lasting im-
 provements. (*Ex parte Barrett*, 15 Jur. 3; 19 L. J.
 Chanc. 415.)

Under an inclosure act, some lands were allotted to a
 rector, who had a power of selling to pay the expenses.
 Under a railway act, compensation was made in respect of
 other lands of the rectory, and paid into court. The court
 sanctioned the application of the money in court to the pay-
 ment of the expenses of the inclosure. (*Ex parte Lock-*
wood, 14 Beav. 158,)

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c. 18.
Sect. 68.

Where a sum of money was in court to be invested in land, the court has ordered a reference as to the proposed investment, but refused to make any prospective order as to any other investment, in the event of the one proposed being rejected. (*Ex parte Pumfrey*, 4 Railw. C. 490.)

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A railway company took some settled land, and paid the purchase money into court. A reference to the master, on *the petition of the tenant for life, to inquire as to the propriety of a proposed purchase of land to be settled to the same uses and the title to it, and a direction that, if he should approve of the purchase and title, he should settle the conveyance, and that the money should be paid to the vendors, were comprised in one order. (*Ex parte Methe-rell*, 20 L. J. Chanc. 629.) (1)

(1) Lands being taken from a Corporation by a Railway Company, the Company paid the price into Court. The Corporation asked that the amount, with other moneys to be supplied by them, might be laid out in a special purchase; held, that the order should direct the payment of costs, according to the Land Clauses Consolidation Act, and that it should provide that the Corporation should pay all extra costs by reason of the extra amount to be invested. (In the matter of the *Southampton and Dorchester Railway Co.*; *ex parte King's College, Cambridge*, 19 Eng. Law and Eq. 317.)

Upon petition that a sum of 1200*l.*, paid by a railway company, for the purchase of land, might be applied in part payment of 2800*l.* for another estate, which estate was to be mortgaged as a security for the remainder of the purchase money, the court refused the petition, on the ground that the trustees of the fund were not authorized to lay out the money in the purchase of an equity of redemption. The petitioner subsequently proposed to make up the necessary amount for the purchase out of his own pocket, and prayed that the estate might be conveyed without a reference. The court refused to make the order without a reference to the master to approve of the title. (*Ex parte Craven, In re*

Cheltenham and Great Western Railw. Co., Law J. 1848, 9 & 9 VICT. Ch. 215.) A purchase made and completed previous to a reference to the master, although afterward approved by him, was held not to come within this section so as to render a railway company liable for the costs of the purchase. (*Ex parte Bouverie*, 5 Railw. C. 431. See *Ex parte Churchwardens of Bicester*, *Re Buckinghamshire Railw. Co.*, 5 Railw. C. 205.)

A railway company having purchased settled land, the tenant for life conveyed to them under their act, and he and the tenant in tail applied for payment of the purchase money out of court. The court refused to make an order without the production of a disentailing deed. (*Re Great Southern and Western Railway Co.*, 9 Ir. Eq. R. 482; *Midland Railw. Co. v. Oswin*, 1 Coll. C. C. 80.)

The petition of a tenant for life, under this act, for the re-investment in the purchase of land of the proceeds of property taken by a railway company, need not be served upon the persons interested in remainder. (*Ex parte Staples*, *Re Brown and Oxford and Bletchley Junction Railway Acts*, 1 De G. M. & G. 294; 16 Jur. 158.)

Service of petitions to invest.

A party entitled to an aliquot share of purchase money, paid into court by a railway company, may, on petition, obtain payment of such share without notice to the other parties interested. (*In re Midland Railw. Co.*, 11 Jur. 1095.)

Certain glebe lands belonging to a rectory having been taken by a railway company, and the money paid into court, a petition was presented by the rector for investment of the money: It was held, that it was not necessary to serve the company with notice of the petition. (*Ex parte Kirkby Overblow* (*Rector of*), 19 L. J. Chanc. 329.)

In cases where the land belonging to a corporation is taken by a railway company, and the purchase money is paid into the bank, the court will not allow any steps to be *taken with reference to the final application of such purchase money, unless it be satisfied that the freemen having interests

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8 & 9 VICT. are represented. (*Re Great Northern Railw. Co. Ex parte*
 c. 19. *Mayor &c. of Lincoln*, 6 Railw. C. 738.)
 Sect. 6J.

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A railway company under pressure, paid the purchase monies for lands bought of a corporation to the vendors instead of paying it into court under this section. Upon a bill filed by the former, the latter were, on motion, ordered to pay into court the purchase money in their hands for the purpose of *interim* investment. (*London and North Western Railw. Co. v. Corporation of Lancaster*, 15 Beav. 22.)

(s) Although this section does not appear to authorize the investment of the purchase money of a freehold estate on copyhold property, yet the court has, upon the report of the master that such an investment was fit and proper, and for the benefit of the persons interested, sanctioned such an investment. (*In re Cann's Estate*, 15 Jur. 3; 19 L. J. Chanc. 376.)

Upon applying for the reinvestment of purchase money, the Court of Chancery in the first instance, will only approve the purchase, the value and the intended investment, and postpone any further order until after the opinion of one of the conveyancing counsel of the court, appointed under 15 & 16 Vict. c. 80, s. 41, has been obtained on the title, and an affidavit made verifying the title; but it will not make the reference to any particular counsel. (*In re Martin*, 22 Law. J. Ch. 248. See *Ex parte Duckle*. 16 Jur. 511; *Ex parte Rector of Lea*, 21 Law. J. Ch. 776; *Ex parte Vicar of East Dereham*, 21 Law. J. Ch. 677.)

(t) A small sum of money in court under a railway act, to be laid out in lands to be settled to the like uses, was ordered to be laid out for the purpose of new erections, the master having reported that sum necessary. (*Ex parte Shaw*, 4 Y & Coll. 506.) Where money is in court under a railway act, previous to being laid out in lands to be settled "to the like uses" as the land sold, the court will lend its aid to an advantageous purchase beyond the amount of

the money in court, and will direct the extra costs to be paid out for the money in court. (*Ex parte Newton, In re Manchester and Birmingham Railw. Act*, 4 Y & Coll. 518.) (1)

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C. 13
Sect. 70.

(1) Lands having been taken for the purpose of a Railway Company, and the money paid into Court, and other lands being approved to be purchased therewith and to be settled to the like uses as the former lands; held, that only *one* application to the Court would be necessary for the carrying this purpose into effect, and that the draft conveyance, approved by the conveyancing counsel, being engrossed with a blank for the date and the other particulars of the order, the Court would make one order, directing the blank to be filled up, and the contract completed. (*In re Caddick's estate*, 17 Eng. Law and Eq. 82, 17 Jur. 84.)

LXX. Such money may be so applied as aforesaid upon an order of the Court of Chancery in England or the Court of Exchequer in Ireland, made on the petition of the party who have been entitled to the rents and profits of the lands in respect of which such money shall have been deposited (*u*); and until the money can be so applied it may, upon the like order, be invested by the said accountant general in the purchase of three per centum consolidated or three per centum reduced bank annuities, or in government or real securities (*v*), and the interest, dividends, and annual proceeds thereof paid to the party who would for the time being have been entitled to the rents and profits of the lands (*v*).

Order for application and investment meanwhile.

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(*u*) The Court of Chancery refused to allow money paid into the bank by a railway company, in respect of land purchased from the tenant for life, to be paid out on mortgage security. (*Ex parte Franklyn, In re Great Northern Railway Co.*, Law. J. 1848, Ch. 166; 5 Railw. C. 206.)

Money paid in by a railway company was invested, and the dividends were directed to be paid, as to part, "to the late archbishop, so long as he should be such," and as to the other part, "during his life, or so long as he should be archbishop." The present archbishop petitioned that the dividends should be paid to him "so long as he should be

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c. 18.
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archbishop, and afterwards to the archbishop for the time being, and that the company should pay the costs." The court made the order. (*Ex parte The Archbishop of Canterbury*, 12 Jur. 1042.)

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Where an estate is directed to be sold and the proceeds to be distributed, the persons entitled to receive the proceeds may petition for payment out of money paid into court under this act, as purchase money for part of the estate. A transfer from one account to another is a payment out of court within the meaning of the act. Where one of several persons entitled petitions under the act, and serves other persons, it is not of course that the company should pay the costs of such respondents. (*Melling v. Bird*, 17 Jur. 155.)

Refusal to
apply money
in payment
of an annu-
ity.

(v) Under the act of parliament for making docks, the value of compensation for property taken for the purpose of the act was directed in certain cases to be paid into the bank in the name of the accountant general, and to be laid out in bank annuities; and until such bank annuities should be sold, and the produce invested in other hereditaments, the dividends were to be paid to the person or persons who would be entitled to the rents and profits of the hereditaments, if unsold. The act also directed that the court, on the application of any person or persons making claim to the money awarded as a compensation, by motion or petition, should in a summary way of proceeding or otherwise, order the same to be laid out and invested in the funds, or distribution thereof, or payment of the dividends, according to the estate, title, or interest of the person making claim thereto. On the petition of an annuitant, whose annuity was charged on the property, with powers of distress and entry, and further secured by a term for payment of his annuity and the arrears thereof out of a fund brought into court under the act, the court held that it had no authority to proceed in a summary way on the petition of an incumbrancer; but only at the instance of the persons who would have been entitled to the rents if the property had been unsold, and dismissed the petition. (*Ex parte Back*, 2 Y & J. 386.)

A company paid money into court for the purchase of land which was subject to an annuity; no conveyance had been made. The court, on the petition of the owner of the land, ordered the dividends to be paid to such owner. (*Ex parte Cofield*, 11 Jur. 1071.)

Leaseholds were bequeathed upon trust, out of the rents and profits to pay an annuity of 52*l.* for the life of the annuitant, and "subject and without prejudice to the annuity," were bequeathed upon other trusts, but without any trusts for sale. The leaseholds were purchased by a railway company, under this act, and the proceeds paid into court: it was held, that portions of the corpus ought to be sold from time *to time to satisfy the growing payments. (*Ex parte Wilkinson*, 3 De G. & S. 633.)

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Sect. 71.

Payment of
annuity or-
dered.

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LXXI. If such purchase money or compensation shall not amount to the sum of two hundred pounds, and shall exceed the sum of twenty pounds. the same shall either be paid into the bank, and applied in the manner herein before directed with respect to sums amounting to or exceeding 200 pounds or the same may be lawfully paid to two trustees, to be nominated by the parties entitled to the rents or profits of the lands in respect whereof the same shall be payable, such nomination to be signified by writing under the hands of the party so entitled; and in case of the coverture, infancy, lunacy, or other incapacity of the parties entitled to such monies, such nomination may lawfully be made by their respective husbands, guardians, committees, or trustees; but such last-mentioned application of the monies shall not be made unless the promoters of the undertaking approve thereof and of the trustees named for the purpose; and the money so paid to such trustees, and the produce arising therefrom, shall be by such trustees applied in the manner hereinbefore directed with respect to money paid into the bank but it shall not be necessary to obtain any order of the court for that purpose (y).

Sums from
20*l.* to 200*l.*
to be deposit-
ed or paid
to trustees.

(y) A part of some lands which had been vested in trustees under the Municipal Corporations Act, was taken by a railway company, and the purchase money was paid into court. An order was made for the investment in consols, and for

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the payment of the dividends to any two of the trustees for the time being. (*In re Collins's Charity*, 20 L. J. Chanc. 168.)

Sums not ex-
ceeding 20*l*
to be paid to
parties

LXXII. If such money shall not exceed the sum of twenty pounds, the same shall be paid to the parties entitled to the rents and profits of the lands in respect whereof the same shall be payable, for their own use and benefit, or in case of the coverture, infancy, idiotcy, lunacy, or other incapacity of any such parties, then such money shall be paid, for their use, to the respective husbands, guardians, committees or trustees of such persons (z).

(z) Where it was probable that after payment of a sum out of court, which had been paid in by a railway company, the balance left would be less than 20*l*., the court ordered the balance, if less than 20*l*., to be paid to the tenant for life. (*Re Lord Egremont*, 12 Jur. 613.)

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Upon the purchase of a piece of land by a railway company, belonging to a rectory, for 200*l*., a new purchase was found for 179*l*. 10*s*. The petition asked that the surplus *20*l*. 10*s*. might be paid to the rector, in liquidation of extra costs beyond those allowed by the act; but this part of the petition was refused. (*Ex parte Vicar of Bredicot, In re Worcester, Birmingham, &c. Railw. Co.*, Law J. 1848, Ch. 414; 5 Railw. C. 209.)

All sums
payable
under con-
tract with
persons not
absolutely
entitled to be
paid into
bank.

LXXIII. All sums of money exceeding twenty pounds, which may be payable by the promoters of the undertaking in respect of the taking, using, or interfering with any lands under a contract or agreement with any person who shall not be entitled to dispose of such lands, or of the interest therein contracted to be sold by him, absolutely for his own benefit, shall be paid into the bank or to trustees in manner aforesaid; and it shall not be lawful for any contracting party not entitled as aforesaid to retain to his own use any portion of the sums so agreed or contracted to be paid for or in respect of the taking, using or interfering with any such lands, or in lieu of bridges, tunnels, or other accommodation works, or for assenting to or not opposing the passing of the bill authorizing

the taking of such lands, but all such monies shall be deemed to have been contracted to be paid for and on account of the several parties interested in such lands, as well in possession as in remainder, reversion, or expectancy; provided always that it shall be in the direction of the Court of Chancery in England or the Court of Exchequer in Ireland, or the said trustees, as the case may be, to allot to any tenant for life, or for any other partial or qualified estate, for his own use, a portion of the sum so paid into the bank, or to such trustees as aforesaid, as compensation for any injury, inconvenience, or annoyance which he may be considered to sustain, independently of the actual value of the lands to be taken, and of the damage occasioned to the lands held therewith, by reason of the taking of such lands and the making of the works (a).

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c 18.
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(a) The sum of 30*l.*, part of a sum of 400*l.* paid by a railway company for glebe land, was ordered to be paid to the rector for his own use; there being affidavits that the necessary alterations in the glebe lands, in consequence of the intersection of the railway, would amount to 30*l.* (*Ex parte Rector of Little Steeping, re East Lincolnshire Railw. Act*, 5 Railw. C. 207.)

A railway company agreed to pay a landowner, tenant for life, a sum of money, for the benefit of him or other the owner for the time being, for idemnifying him from the expenses of making a new road, &c., and as a compensation for the annoyance which he or such other owners as aforesaid might sustain in consequence of the construction of the railway; and the company agreed to pay a further sum as the price of the land taken. Both sums were paid into court. The application of the tenant for life for the absolute payment to him of the first sum was refused, the costs of the road, &c., were ordered to be paid out of it, and the rest invested. (*Re Duke of Marlborough's Estates*, 13 Jur. 738.) [*316]

LXXIV. Where any purchase money or compensation paid into the bank under the provisions of this or the special act shall have been paid in respect of any lease for a life or lives or years, or for a life or lives and years, or any estate in lands less than the whole fee simple thereof, or of any rever-
Court of Chancery may direct application of money in respect of

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leases or re-
versions as
they may
think just.

sion dependent on any such lease or estate, it shall be lawful for the Court of Chancery in England or the Court of Exchequer in Ireland, on the petition of any party interested in such money, to order that the same shall be laid out, invested accumulated and paid in such manner as the said court may consider will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease, estate or reversion in respect of which such money shall have been paid, or as near thereto as may be (b).

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(b) A railway company took some land which had been demised by a dean and chapter for twenty-one years to a lessee on a beneficial lease. The company settled separately with the lessee, and purchased the reversionary interest of the dean and chapter. This purchase money was ordered to be invested in consols. It was held, that, after providing for the payment of the dean and chapter of the rent reserved by the lease, the remainder of the dividends to accrue on the stock until the expiration of the term were not payable to the dean and chapter, but ought to be accumulated. (*Gloucester. Dean and Chapter of, Ex parte*, 15 Jur. 293; 19 L. J. Chanc. 400.)

The rector of L., seised in right of his office of certain houses taken by a railway company under the powers of their act, applied by petition for the investment of a sum of money which had been paid by a railway company for compensation and for the reversion, and thereby prayed for payment of the dividends to the petitioner and his successors. It appearing that the house in question were subject to leases, of which about thirty years were unexpired, at a nominal rent, the court refused to make the order as prayed, but directed the investment and accumulation of the sum with liberty to apply. The Lord Chancellor said, "the calculation is, what is the present value of the compensation which is to be paid to the incumbent who shall hold the living at the time the leases fall in?" If, therefore, the dividends were ordered to be paid to the present rector, it would be at the expense of the future incumbent. The prayer of the petition could not be granted. It requires a new act of parliament;

*and his lordship recommended the present rector to apply to the Ecclesiastical Commissioners, that they might by an act of parliament, procure the sum in question to be laid out for the benefit of the living. *Ex parte The Rector of Lambeth re South Western Railway Company's Acts*, 4 Railw. C. 231.)

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A lessee under a dean and chapter, and the latter sold their respective interests in the leaseholds, by a joint contract, to a railway company. The money was paid in in one sum, 1760*l.* The court, on the petition of the lessee, refused to apportion the 1760*l.* between the parties; but by their consent, directed the investment of it in consols, the dividends of so much of it as represented the lease to be paid to the lessee, during the continuance of the term, he paying the dean and chapter sums equal to the rents reserved by the lease. (*Ex parte Ward, re Midland Railways Act*, 1845; 12 Jur. 322; Law J. 1848, Ch. 249; 5 Railw. C. 398; 2 De G. & S. 4.)

The purchase money of a leasehold interest, purchased by a railway company, was paid into court to an account, "*ex parte* the company, the account of the two lessees," and the dividends were ordered to be paid to one lessee, and the executrix of the other. The executrix married. It was held, that on a petition for payment of the dividends to the husband and the other lessee, it was unnecessary to serve the company, and that the petitioners having served them, must pay their costs. (*Ex parte Hordon*, 2 De G. & S. 263; 12 Jur. 846.)

The dividends of investments of purchase money paid into court by a railway company, for lands belonging to the archbishop of Canterbury, were ordered to be paid to the archbishop for the time being. (*Canterbury, Archbishop of, Ex parte*, 2 De G. & S. 365.)

Leaseholds for years, determinable on lives, were bequeathed in trust for one for life, and then over, with a direction to the trustees to renew once for the purpose of inserting a new life in the place of the testator, who was one of the cestuis que vie. The testator died. The land was taken by a railway company, who paid into court a sum of money for the

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c. 18.

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purchase of the leasehold interest. The trustees neglected to renew. The leaseholds expired. Upon petition, the money was ordered to be paid to the tenant for life without prejudice to any question as to the renewal. (*In re Beaufoy's trust*, 16 Jur. 1084.)

Upon deposit
being made
the owner of
the lands to
convey or in
default the
lands to vest
in the pro-
motors of the
undertaking
upon a deed-
poll being
executed.

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LXXV. Upon deposit in the bank in manner herein-before provided of the purchase money or compensation agreed or awarded to be paid in respect of any lands purchased or taken by the promoters of the undertaking under the provisions of this or the special act, or any act incorporated therewith, the owner of such lands, including in such term all parties by this act enabled to sell or convey lands, shall when required so to do by the promoters of the undertaking, duly convey such lands to the promoters of the undertaking, or as they shall direct; and in default thereof, or if he fail to adduce a good title to such land to their satisfaction, it shall be lawful for the promoters of the undertaking, if they think fit, to execute a deed-poll under their common seal if they be a corporation, or if they be not a corporation, under the hands and seals of the promoters, or any two of them, containing a description of the lands in respect of which such default shall be made and reciting the purchase or taking thereof by the promoters of the undertaking, and the names of *the parties from whom the same were purchased or taken, and the deposit made in respect thereof, and declaring the fact of such default having been made, and such deed-poll shall be stamped with the stamp duty which would have been payable upon a conveyance to the promoters of the undertaking of the lands described therein; and thereupon all the estate and interest in such lands of or capable of being sold and conveyed by the party between whom and the promoters of the undertaking such agreement shall have been come to, or as between whom and the promoters of the undertaking such purchase money or compensation shall have been determined by a jury or by arbitrators, or by a surveyor appointed by two justices as herein provided, and shall have been deposited as aforesaid, shall vest absolutely in the promoters of the undertaking, and as against such parties, and all parties on behalf of whom they are hereinbefore enabled to sell and convey, the promoters of the undertaking shall be entitled to immediate possession of such lands (c).

(c) Under a local act proprietors of lands were authorized "to contract for, sell and convey" their lands to a canal company; such contracts, agreements, sales, exchanges, conveyances and assurances, were to be valid to all intents and purposes; were to be enrolled with the clerk of the peace, and copies thereof to be evidence; and upon payment of the sum agreed on for the purchase of lands, such lands were to be vested in the canal company. It was held that a conveyance under this act must be in writing, which might be presumed from the acts of the parties, and the length of time which had elapsed, which is a question for the consideration of a jury. (*Doe d. Robins v. Warwick Canal Co.*, 2 Bing. N. C. 483.)

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c. 18.

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Acts to be
done for vest-
ing lands in-
company.

A canal act (33 Geo. 3, c. ciii. s. 31) provided, that after land, &c. should be set out for making the intended canal, it should be lawful for all persons seised or possessed of or interested in any such land, &c., to contract for, sell, and convey the same to the company, and that all such contracts should be *enrolled* with the clerk of the peace, &c., and copies thereof be evidence. By section 34, commissioners are appointed (for settling differences between the owners and company), who by sect. 41, *by writing*, under their hands and seals, with consent of parties, are to determine and adjust the sum to be paid by the company for the purchase of such lands, &c.; or in case of refusal or incapacity to treat &c., to summon a jury to assess the sum to be paid, the verdict of which jury is to be binding and conclusive on all parties. Sec. 47 provides that upon payment of such sum or sums of money as shall be contracted or agreed for between the parties, or determined or adjusted by the commissioners, or assessed by such juries *in manner hereinbefore respectively mentioned*, such lands shall be vested in the *company. It was held that to vest lands in the company otherwise than by actual conveyance, there must be payment for lands contracted for in writing, or the price of which was adjusted by the commissioners, in writing or the value found by the jury in writing: and that proof of payment of purchase money to the owner for lands without proof of such contract in writing, is not sufficient evidence of title. (*The*

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c. 18.
Sect. 76. & W. 87.)

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Where a company is authorized to purchase lands for the purposes of the act, which directs that in case of difference with the landowners, a compensation jury shall be impanelled and that the verdict shall be made a record of quarter sessions, if the company take possession after payment of the sum assessed; it was held on a question of rating, that no conveyance is necessary, the record of quarter sessions being available as a title, whether they had the legal estate or not. In this case there had been a sitting of commissioners, and a jury had assessed a sum, with the approbation of the proprietors, as a full recompense for the land. *Littledale, J.*, said "It is contended, that because no conveyance was executed no land passed; but it seems to me that a conveyance was not necessary. It is only necessary in contracts between party and party. When a jury has recorded its verdict, that is the title by which they hold the land, and a conveyance would be perfectly useless." (*Bruce v. Willis*, 3 P. & Dav. 220; 11 Ad. & E. 463; 2 Railw. C. 7.)

Where parties refuse to convey, or do not show title or cannot be found, the purchase-money to be deposited.

LXXVI. If the owner of any such lands purchased or taken by the promoters of the undertaking or of any interest therein, on tender of the purchase money or compensation either agreed or awarded to be paid in respect thereof, refuse to accept the same, or neglect or fail to make out a title to such lands, or to the interest therein claimed by him, to the satisfaction of the promoters of the undertaking, or if he refuse to convey or release such lands as directed by the promoters of the undertaking, or if any such owner be absent from the kingdom, or cannot after diligent inquiry be found, or fail to appear on the inquiry before a jury as herein provided for, it shall be lawful for the promoters of the undertaking to deposit the purchase money or compensation payable in respect of such lands, or any interest therein, in the bank, in the name and with the privity of the accountant-general of the Court of Chancery in England or the Court of Exchequer in Ireland, to be placed except in the cases herein otherwise provided for, to his account there, to the credit of the parties interested in such lands (describing them so far as

the promoters of the undertaking can do), subject to the control and disposition of the said court (*d*).

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c. 18.

Sect. 77.

*(*d*) An act of parliament establishing a railway company provided, that if the owner of any land required by the company should refuse to accept the purchase money or compensation awarded, or should fail to make out a title to such land to the satisfaction of the company, or if any such owner should be out of the kingdom, or not to be found, or be unknown or should refuse to convey such land, &c., the company might pay the purchase money into the Bank of England, in the name of the accountant-general of the Court of Chancery, whereupon all the interest of the owner in those lands should vest in the company. By subsequent sections, the company were to give notice to the parties interested of their intention to treat for lands, and if any difference should arise or no agreement come to respecting the lands or compensation money to be given for them, or if such owner should, by reason of absence, be incapable of treating for them, or should fail to disclose or prove his title to them or should be incapable of making any agreement or necessary conveyance, the amount of the compensation money should be settled by a jury. The company offered A., who was possessed of a leasehold interest in lands, a certain sum, and on his refusing to accept it had the amount of compensation assessed by a valuation jury and paid the amount into the Bank of England, and took possession of the land: it was held, that they were not entitled to do so and ought to have called on the plaintiff, after the assessment by the jury, to make out his title to the land. (*Doe d. Hutchinson v. Manchester, Bury and Rossendale Railw. Co.*, 9 Jur. 949; 3 Railw. C. 748.)

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When company was not authorized to pay purchase money into the bank.

LXXVII. Upon any such deposit of money as last aforesaid being made, the cashier of the bank shall give to the promoters of the undertaking, or to the party paying in such money by their direction, a receipt for such money, specifying therein for what and for whose use (described as aforesaid) the same shall have been received, and in respect of

Upon deposit being made, a receipt to be given, and the lands to vest upon a deed-poll being executed.

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c. 18.
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what purchase the same shall have been paid in; and it shall be lawful for the promoters of the undertaking, if they think fit, to execute a deed-poll under their common seal if they be a corporation, or if they be not a corporation, under the hands and seals of the said promoters, or any two of them, containing a description of the lands in respect whereof such deposit shall have been made, and declaring the circumstances under which and the names of the parties to whose credit such deposit shall have been made, and such deed-poll shall be stamped with the stamp duty which would have been payable upon a conveyance to the promoters of the undertaking of the lands described therein: and thereupon all the estate and interest in *such lands of the parties for whose use and in respect whereof such purchase money or compensation shall have been deposited shall vest absolutely in the promoters of the undertaking and as against such parties they shall be entitled to immediate possession of such lands.

Application
of monies so
deposited.

LXXVIII. Upon the application by petition of any party making claim to the money so deposited as last aforesaid, or any part thereof, or to the lands in respect whereof the same shall have been so deposited, or any part of such lands, or any interest in the same, the said Court of Chancery in England or the Court of Exchequer in Ireland may in a summary way, as to such court shall seem fit, order such money to be laid out or invested in the public funds, or may order such distribution thereof, or payment of the dividends thereof, according to the respective estates, titles or interests of the parties making claim to such money or lands, or to any part thereof, and may make such other order in the premises as to such court shall seem fit (*e*).

Evidence of
title to lands.

(*e*) By a railway act it was enacted, that in case any question should arise as to the title of the lands to be taken or used for the purposes of the act, the party in possession at the time of the purchase shall be deemed to be lawfully entitled until the contrary should be shown to the satisfaction of the court; and it was further enacted, that in case the proprietor, or other party interested in the land and entitled to receive the purchase money, should be unable to make a title to the land, it should be lawful for the company to pay the

money into court to the credit of the party interested, subject to the disposition of the court, and thereupon the company's title should be deemed complete under that act, the company having contracted to purchase a piece of land of the party in possession, and having entered into possession under the contract, objected to the title and paid the money into court to the credit of the party with whom they had so contracted. It was held that such party, upon his own affidavits of title was entitled to payment of the money out of court to his own absolute use. (*Ex parte Grainge*, 2 Y. & C. 62.) In a subsequent case, in which application was made on behalf of Lord *Ellenborough*, there being no other evidence of title to the lands than his Lordship's affidavit, Alderson, B., observed "I am bound by the authorities, though I do not comprehend them. The party may sell to the company lands in strict settlement, and then apply for the money out of court." (*In re Birmingham and Gloucester Railway Act*, 3 Y. & C. 66.) It seems that where money is paid into court under the usual provisions in a railway act for payment into court of purchase money for lands in case of disputed titles, the respective interests *of the parties claiming title to the money so paid [*322] into court may be adjusted on a petition presented in the matter of the act. (*Ex parte Issauchand*, 3 Y. & Coll. 721.)

It was a general order of the Court of Exchequer, that in all petitions under acts of parliament for sale of property for public purposes, when the purchase money is directed by the act to be paid into court, the petitioners claiming to be entitled to the money so paid in, must, in addition to the usual affidavit verifying their title, make oath, that they believe they have a good title, and are not aware of any right in any other person, or of any claim made by any other person, to the sum of money, in the petition presented by them in the matter mentioned, or in any part thereof, (4 Railw. C. 498, n.) There has been no general order of the Court of Chancery rendering such an affidavit necessary, but the registrars are authorized to require it on all such occasions. (Dan. Ch. Pr., 1739, 2nd ed.) On a petition for invest-

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c. 18.
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Sect 79.

ment of purchase money of lands taken by a railway company, and payment of dividends to a tenant for life, the court refused, even under special circumstances, to dispense with the usual affidavit of the petitioner, as to goodness of title, &c., although the railway company appeared by their counsel to consent. (*Ex parte Hollick, Re Eastern Counties Railw. Co.*, 4 Railw. C. 498; *Ex parte Shears*, 2 Y. & J. 493.)

It has been held, that the above order is only applicable to petitions for payment of capital or principal and not to petitions by tenants for life for payment of dividends. (*In re Braye*, 22 Law J. Ch. 285.)

Upon a reference to the master to inquire as to the title to compensation for damage done to lands, he ought regularly to inquire whether the damage be temporary or permanent. (*Cator v. Croydon Canal Co.*, 4 Y. & C. 405.)

Party in possession to be deemed the owner.

LXXIX. If any question arise respecting the title to the lands in respect whereof such monies shall have been so paid or deposited aforesaid, the parties respectively in possession of such lands, as being the owners thereof, or in receipt of the rents of such lands as being entitled thereto at the time of such lands being purchased or taken, shall be deemed to have been lawfully entitled to such lands, until the contrary be shown to the satisfaction of the court; and unless the contrary be shown as aforesaid, the parties so in possession, and all parties claiming under them, or consistently with their possession, shall be deemed entitled to the money so deposited, and to the dividends or interest of the annuities or securities purchased therewith, and the same shall be paid and applied accordingly (*f*).

(*f*) This section applies only to the jurisdiction of equity, in ordering money to be paid out, and not to that of a court of law, in determining the rights of parties in an issue. (*Ex parte Freeman and Stallingers of Sunderland*; 1 Drewry, 184.)

[*323] *This section contains only a direction to the Court of Chancery, and is not intended to guide a jury upon the trial

of an issue. Where the jury on the trial of an issue relating to the title to land, found for the defendant, on the ground that neither party had made out a satisfactory title, the court does not regard that as establishing the right of the defendant, and will direct a new trial; it seems that an issue ought to try in whose possession the land was. (*The Freemen, &c. of Sunderland v. Bishop of Durham*, 16 Jur. 370.)

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c. 18.
Sect. 80.

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LXXX. In all cases of monies deposited in the bank under the provisions of this or the special act, or an act incorporated therewith, except where such monies shall have been so deposited by reason of the wilful refusal of any party entitled thereto to receive the same, or to convey or release the lands in respect whereof the same shall be payable, or by reason of the wilful neglect of any party to make out a good title to the land required, (g) it shall be lawful for the Court of Chancery in England or the Court of Exchequer in Ireland to order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters of the undertaking (h); that is to say, the costs of the purchase or taking of the lands, or which shall have been incurred in consequence thereof, other than such costs as are herein otherwise provided for, and the costs of the investment of such monies in government or real securities, and of the reinvestment thereof in the purchase of other lands, and also the costs of obtaining the proper order for any of the purposes aforesaid, and of the orders for the payment of the dividends and interest of the securities upon which such monies shall be invested, and for the payment out of court of the principal of such monies, or of the securities whereon the same shall be invested, and of all proceedings relating thereto, except such as are occasioned by litigation between adverse claimants: provided always, that the costs of one application only for reinvestment in land shall be allowed, unless it shall appear to the Court of Chancery in England or the Court of Exchequer in Ireland that it is for the benefit of parties interested in the said monies that the same should be invested in the purchase of lands, in different sums and at different times, in which case it shall be lawful for the court, if it think fit, to order the costs of

Costs in cases of money deposited.

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any such investments to be paid by the promoters of such undertaking (i).

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(g) This section is to be construed strictly against the company. *It would be a "wilful refusal" within this section if, without any reason, the vendor refuses to accept the purchase money, or if his objection is merely capricious: but where there is a fair objection, a party is not to be treated as having wilfully refused, because the reason for his refusal afterwards turn out untenable. (*Re Windsor, Staines and South Western Railw. Act*, 12 Beav. 522.) The owner of land who was entitled to receive the purchase money under an award, refused to receive it, on the ground that he thought the award invalid; thereupon the promoters paid the purchase money into court. The owner, subsequently, obtained a rule to show cause why the award should not be set aside; this rule was, upon mature argument, discharged; it was held, that the "wilful refusal," mentioned in this section, meant a refusal without reason; and that here as there was a *bona fide*, and not a mere captious question to be decided, the case was not within the exception, and the owner was entitled to his costs. (*East and West India Docks, and Birmingham Junction Railw. Act*, *In re* 12 Jur. 888; Law J. 1848, Ch. 454; 5 Railw. C. 432; 16 Sim. 174.)

When costs
ordered to be
paid by com-
pany.

(h) A railway company, being unable to come to terms with the owner of the fee proceeded to summon a jury; the landowner, being advised that notice had not been properly served on him, did not appear before it, and the damages were assessed in his absence, and the amount paid into court. It was subsequently decided that the notice had been regularly served. On the landowner applying for payment of the money out of court, the company was ordered to pay the costs of the application. (*Ex parte Railston*, 15 Jur. 1028.)

A. purchased Green-acre for 1000*l.*, in lieu of Black-acre, which a railway company had taken from him, and for which they had paid 644*l.* into court. The company were ordered to pay A. the same costs as he would have been entitled to

under this section of the act—if Green-acre had cost 644*l.* only. (*Ex parte Hodge, in re Sheffield and Lincolnshire Railw. Act*, 16 Sim. 155; 12 Jur. 239.)

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Where purchase money of land taken by a railway company is in court to be invested in the purchase of other land, the court will allow all costs, charges and expenses according to the act, of as many investments as may be necessary to consume the whole purchase monies in court. (*Ex parte Louverie, re London and Birmingham Railw. to Northampton*, 4 Railw. C. 229; *Re Merchant Tailor's Co.*, 10 Beav. 485; *Jones v. Lewis*; 2 Mac. & G. 163; 2 Hall & T. 406. See *post*, p. 329.)

A railway company, under their act, took part of the glebe of a rectory. Part of the purchase money was invested on other land. The rector bought a small additional piece of land for 6*l.* and petitioned that the sum might be paid out of the balance of 20*l.* 9*s.* 5*d.* remaining in court, and the remainder to be paid to him. On making the order, the court directed the company to pay the costs of the second investment. (*Ex parte Rector of Loughton*, 14 Jur. 102; 5 Railw. C. 594.)

*A railway company purchased settled lands, and paid the money into court. Lands were purchased with this sum, and with a sum provided by the tenant for life of the land sold. The court directed that the costs of the company should not be increased by reason of the price given for the purchased land being greater than the sum in court. (*In re Branmer's Estate*, 14 Jur. 236.)

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The costs occasioned by a reference to the master, as to the propriety of a sale of part of the lunatic's estate to a railway company, were ordered to be paid by the company, under this section. (*In re Taylor*, 1 Mac. & G. 210; 6 Railw. C. 741.) The costs of the heir-at-law of a lunatic, attending the master upon a reference regarding the taking of a portion of the lunatic's land by a railway company, were ordered to be paid by the company. (*In re Walker*, 15 Jur. 161; 20 L. J. Chanc. 474.) Certain land belonging partly to infants, having been taken by a company, the money was

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paid into court. The persons entitled to the fund having attained their majority, petitioned for payment of the money to them: it was held, that the company must pay the costs of the petition. (*Ex parte Slater's Devises*, 18 Law J. Ch. 431; 5 Railw. C. 700: see *Ex parte Palmer*, 13 Jur. 781.) A railway company took lands, the subject of an administration suit, and in which infants and married women were interested, and a reference was made to the master in the cause to ascertain what course was most beneficial for the parties under disability. The company was directed to pay all the costs, charges, and expenses of the petition and reference. (*Picard v. Mitchell*, 12 Beav. 486.)

The parties to certain pending suits petitioned to have a sum of money, which had been paid into court by a railway company, invested in trust in the suits, and also to have the dividends invested and accumulated. Several of the parties to the suit appeared by their counsel to consent: it was held that the railway company were bound to pay the costs of all. In this case, Lord *Langdale*, M. R., observed, "that if parties are put to expense by having their land taken away from them by the extraordinary powers conferred by the legislature on companies, it surely would be unreasonable that such parties should be obliged to bear that expense. (*Re Hull and Selby Railw. Co.*, 5 Railw. C. 558; see *Hore's Estate and South Devon Railw. Co.*, *ib.* 592.)

Where devisees in trust of a testator, whose estate is in the course of administration in a suit, sell to a railway company, under this act, the company pays the costs of a petition for transferring the purchase money from the account of the railway act to that of the suit. (*Dinning v. Henderson*, 2 De G. & S. 485.)

A tenant in tail, on attaining his majority, barred the entail in certain monies, the produce of land sold by his guardian to the Great Western Railway Company. The court, on his petition, ordered payment to him of the money, and of costs, charges and expenses incidental to the application. (*Ex parte Marshall*, 4 Railw. Ca. 58.)

A petition was presented by a tenant for life of land taken
 *by the North Midland Railway Company, praying the in-
 vestment of certain monies, which had been paid into court
 under the railway act, in the purchase of other lands, to be
 settled to the like uses, and also the costs, charges, and ex-
 penses of the petitioner. An objection was taken as to the
 whole costs being borne by the company, on the ground that
 the land, which was to be the object of the investment, was
 of much greater value than the sum in court, it having been
 lately purchased by the petitioner at a much larger sum; and
 that it was only by arrangement with his trustees that the pe-
 titioner accepted the sum in court as the purchase money for
 the same, in order to bring the lands into settlement. *Shad-*
well, V. C., made the order as prayed. (*Ex parte Lord*
Palmerston, re North Midland Railw. Co., 4 Railw. Ca.
 57.)

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 Costs paya-
 ble by com-
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Upon petition for the investment of money paid in under
 a railway act, it was objected that the petition was made un-
 necessarily long by the introduction of certain clauses in the
 railway acts, which being public acts, were sufficiently known
 to the court, and that the costs of such petition ought not to
 be allowed: it was held, that the introduction of the railway
 clauses was not unnecessary, and that the petitioner was en-
 titled to costs. (*In re Lilley's Trustees*, 17 Sim. 110; 19
 L. J. Ch. 329.) In another case, it was held to be improper
 to set out this statute in pleadings. (*Re Manchester, &c.*
Railw. Act, 8 Hare, 31.)

Under the original London and Birmingham Railway Com-
 pany's Act, 3 & 4 Will. 4, c. xxxvi, the Court of Chancery
 had power to order the company to pay all the expenses at-
 tending the re-investment in the purchase of land of all mon-
 ey paid into the bank of England, under that act, to be ap-
 plied in the purchase of other lands, together with the neces-
 sary costs and charges of obtaining such order, but there was
 no power under that act for the court to order the company
 to pay the costs and expenses of an interim investment in
 government securities. The company purchased land from

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Eton College, prior to the year 1845, and the purchase money was paid into the Bank of England, under the act, in the month of May, 1846. In 1845, this act passed. Amongst such matters, were included the costs of investment in government securities, and the costs of obtaining the proper orders. In July, 1846, an act of parliament was passed, the 9 & 10 Vict. c. cciv, by which the London and Birmingham Railway Company, the Grand Junction Railway Company, and the Manchester and Birmingham Railway Company, were all dissolved, as separate companies, and incorporated, into one called the London and North Western Railway Company into which this act was incorporated: it was held, upon the petition of Eton College for the interim investment of the purchase money in government securities, and upon the construction of the several acts of parliament, that the court had power to order the company to pay the costs attending such investment, and of obtaining the order therefor. (*Ex parte Eton College*, 15 Jur. 45; 20 L. J. Chanc. 1.)

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*By an act of parliament, the London Dock Company were empowered to purchase lands for the purposes of the act; and in certain cases, the purchase monies were to be reinvested in the purchase of other lands, and the expenses of the reinvestment were to be paid by the dock company. In a subsequent part of the same act, the lords of the treasury were empowered to purchase certain quays within a limited time; but no express directions were given as to the reinvestment of the purchase monies, or as to the payment of the expenses. By a subsequent act, not relating to the dock company, the time given to the lords of the treasury for purchasing the quays was extended, and it was enacted that all the powers, provisions, regulations, directions, clauses, matters and things in the former act should extend to the subsequent act: it was held, on appeal (affirming the decision of *Shadwell*, V. C.,) that the clauses in the former act as to the reinvesting the purchase monies, and the payment of the expenses of such reinvestment, were applicable, *mutatis mutandis*, to the subsequent act. (*In the matter of the Lords of the Treasury*, 1 Myl. & Cr. 676.)

A sum of money was paid into court upon the purchase of certain land by a railway company, whose act provided for the costs for obtaining the money out of court. That railway was incorporated with a second railway, and the act of the first railway was repealed. The act of the second railway did not provide for the costs. The second railway was then amalgamated with a third railway, and both the previous acts were repealed; but it was provided, that where any money had been, or should be paid into court by either of such dissolved companies, upon the purchase of lands, such monies should be held, and disposed of, pursuant to the act, under which the same had been paid, and the provisions in such act relating to the money so paid should remain in full force: it was held, that the costs of obtaining the money out of court should be paid by the third railway company. (*Ex parte Chetwode*, 18 L. J. Ch. 418.)

(i) Where a railway company have contracted for the purchase of lands, and the price has been fixed and the conveyance executed, they have a right to call on the vendors to make out their title. Where the act provided "that all such contracts, sales and conveyances shall be made at the expense of the company," it was held that those words included the expenses of the vendors in making out their title to the land sold to the company. (*Ex parte the Trustees of Addey's Charity, re London and Greenwich Railw. Co.* 3 Railw. C. 119; 3 Hare 22.)

Where under a railway act the company are liable to the expenses of "all purchases" to be made by virtue of the act, this will include the expenses of investing the money in the funds previously to its being laid out in lands, to be settled to the like uses as the land purchased by the company. (*Ex parte Bishop of Durham*, 3 Y. & C. 690.) But the words "costs in consequence of the purchase" were held not to carry the costs of the interim investment in the funds. (**Ex parte Hirst, re Birmingham and Derby Junction Railway Act*, 4 Y. & C. 468.) Where, by a railway company act it was enacted that the monies paid into court by

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terim invest-
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the company for lands purchased by them should, by order made upon the petition of the party interested, be invested in the purchase of other lands, to be settled to the like uses, and in the meantime should, by an order similarly obtained, be invested in the funds; and it was further enacted, that the court might order the expenses of such purchases, and the investment of the purchase money in land, "or other disposition of the same," to be paid by the company: it was held, that the company were liable to pay the expenses of the interim investment of the money in the funds. (*Ex parte Onslow, re London and Birmingham Railway Act*, 1 Y. & C. 553.)

Where an act of parliament establishing a railway company authorized the company to purchase lands of corporations, tenants for life, &c., and directed that the purchase money should be applied in the redemption of the land-tax upon other parts of the property unsold, it was held that a tenant for life who had redeemed the land-tax before the passing of the act might reimburse himself out of the proceeds of the lands purchased of him by the company. The costs of an application to the court under such an act of parliament to have the purchase money applied *in the redemption of the land tax* will be allowed out of the purchase money, although the act only makes an express provision for such costs in cases where the money is to be laid out in the purchase of lands to be settled *to the like uses*. (*Ex parte Northwick*, 1 Y. & C. 166.) So where under the provisions of a railway act lands are purchased by the company of corporations, tenants for life, &c., the costs of an application to the court to have the purchase money applied in the discharge of incumbrances, will be directed to be paid by the company, although the act only makes an express provision for such costs in cases where the money is to be laid out in the purchase of lands to be settled to the like uses. (*Ex parte Trafford, re Liverpool and Manchester Railway Co.*, 2 Y. & C. 522; see *Ex parte Earl Hardwicke*, L. J. 1848, Ch. 422, *post* p. 330.) Where a railway act gives the court power to order

the reasonable costs of the parties incurred in procuring the payment of their purchase money out of the court to be paid by the company, it is the duty of the court to give the costs, unless a special case be made out, otherwise the party has his estate diminished by its being taken from him by the company against his will. The company must pay the costs of all persons who properly claim and are entitled to the fund, but will not be liable to pay the costs of a party who claims and turns out *not* to be entitled to the fund. (*Ex parte Gardiner, re Eastern Counties Railw. Co.*, 3 Railw. C. 117. See *ante* p. 325.)

Under the act enabling the corporation of Trinity House to purchase property, and in certain cases to pay the purchase money into court, to be laid out in stock for the benefit of the parties entitled, providing that the costs of the investment * of the purchase money shall be paid by the corporation, the broker's commission on the purchase of stock is a part of the costs of investment to be borne by the corporation. (*In re 6 & 7 Will.* 4, c. 79, *Ex parte Corporation of Trinity House*, 3 Hare, 95.)

Where by a railway act a power was reserved to the court to order the reasonable expenses of reinvesting a sum of money in the bank, the produce of land purchased by the company, to be paid by the company, the court ordered the costs of two applications for reinvestment of parts of the same sum to be paid by the company: but it seems that the costs of any further application must be borne by the parties applying. (*Ex parte Eton College, re London and Birmingham Railw. Co.*, 3 Railw. C. 271.) The costs of a third reinvestment of purchase money were allowed to the vendor where the entire purchase money was very large. (*In re St. Catherine's Dock Co.*, 3 Railw. C. 514; *Ex parte Trustees of Boxmore Waste Land, re London and Birmingham Railw. Co.*, 3 Railw. C. 513. See *ante* 324.)

The costs of an application for the transfer out of court of a sum of stock, the produce of land taken by a railway company under the powers of their act from a party under disability, were held, upon the construction of the terms of the act, which were very general, to be payable by the com-

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which rail-
way compa-
nies have
been held not
liable to
costs.

pany; for where a public company takes a person's land without his consent for their own purposes, it is right they should pay all the expenses incident to it. (*In re Great Western Railw. Co. ex parte Marshall*, 1 Phillips, C. C. 560. See *Mitchell v. Newell*, 3 Railw. C. 515.)

The Great Western Railway Company were by a clause in their act compelled, if they took any part of the glebe belonging to the vicarage of Tiverton, to take the house also, and the vicar and patrons for the time being were empowered, on petition by them to the Court of Exchequer, with the consent of the ordinary, to lay out any part of the purchase money in purchasing or erecting a new vicarage house; but the act did not declare by whom the costs of getting the money out of court for this purpose should be defrayed. It was held, that the railway company were not liable for the costs, charges and expenses of getting the money out of court for the purpose of building the new vicarage house and that the sections of the act generally declaring the company liable to the costs, &c., of money taken out of court, apply only to the cases in which such money is to be reinvested in the manner specifically declared by the acts of parliament. (*Ex parte Madon, re Great Western Railw. Co.*, 4 Railw. C. 49.)

A sum of money was paid into court by a railway company for the purchase of land, to the account of the company. There was a suit subsisting which rendered it necessary to present a petition in the matter of the company's act, and in the cause. The court held that the company must only pay the costs occasioned by the petition being presented in the matter of the act, and the costs of the parties in the cause were to be costs in the cause. (*Hore v. Smith*, 14 Jur. 55.)

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Costs not
payable by
company.

*A railway company entered into a contract for the purchase of a portion of a copyhold property, which they required for the purposes of their undertaking. The legal right to admittance was outstanding in the infant heir of a deceased trustee and to enable the vendors to complete their contract, a petition was presented, under stat. 1 Will. 4, c. 60, for the

appointment of a person to be admitted in the place of the infant, which was ordered accordingly, and a surrender was made by him to the company. It was held, that the company were not bound under the provisions of this act, to pay the costs of the petition presented under the Trustee Act. (*In re South Wales Railw. Co.*, 15 Jur. 1145; 20 L. J. [330] Ch. 534.)

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c 18.
Sect. 80.

The costs of obtaining orders for the investment of purchase money paid by a railway company in alterations of almshouses, are not to be borne by the company. (*In re Buckinghamshire Railw. Co.*, 14 Jur. 1065.)

Upon the purchase of land by a railway company, it was held, that the company were not liable under their act for the costs incurred by the application of the purchase money in paying off an incumbrance upon the land. (*Ex parte Earl Hardwicke, In re Eastern Counties Railw. Co.*, Law. J. 1848, Ch. 422.) (1)

(1) So when a Railway Company has paid money into Court, and the person whose lands were taken wishes to re-invest the money, the Company cannot be called on to pay such costs, as by a voluntary agreement, on the part of the person so investing, were to be paid by him. (*North Staffordshire Railw. Act, in re* 23 Eng. Law and Eq. 532.)

A railway company purchased certain land which was devised to the petitioner for life, and then to his children. The tenant for life had mortgaged his life estate, and the mortgagees were made parties to the conveyance to the company. The purchase money was paid into court. The tenant for life now presented a petition for its investment. The mortgagees were served, and asked for their costs. It was held that such costs must be paid by the mortgagor, and not by the railway company. (*Ex parte Smith's Estate*, 19 L. J. Ch. 56. *re Yeates*, 12 Jur. 279; 6 Railw. C. 150.)

A tenant in tail, on attaining his majority, barred the entail in certain monies, the produce of land sold by his guardian to the Great Western Railway during his minority, and presented a petition to the court for the payment to him of the purchase monies and of the costs, charges and expenses

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c. 18.
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incident to the application. The order was made as prayed, notwithstanding an objection on the part of the company that the words of the act were confined to the costs of the purchase of lands, and that the petitioner having elected to take the money as money, and not to reinvest in the purchase of lands, the company were not bound to pay the petitioner's costs. (*Ex parte Marshall, re Great Western Railway Acts*, 4 Railw. C. 58.)

The purchase money of lands purchased by the Midland Counties Railway Company, under their act, from a tenant in tail, was paid into the bank. It was held that the tenant in tail, who had barred the entail of the money and then presented a petition for the payment of it, was not entitled to the costs of the petition. (*Ex parte Thoroton, In re Midland Counties Railw. Co.*, Law. J. 1848, Ch. 167.)

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The devisees in trust under the will of J. S. R. presented a petition to the court, praying that a sum of money paid in *by a railway company, together with another sum held by them for a like purpose, might be invested in the purchase of certain closes of land, of the value of the amount of the two sums, and also praying the taxation and payment by the company to the petitioners of the costs, charges and expenses attending the purchase. It was held, that under the act of parliament the petitioners were not entitled to any such costs, charges and expenses, nor to the costs of the application. (*Ex parte W. Tetley, re Great North of England Railw. Co.*, 4 Railw. C. 55.) (1)

(1) Where a Railway was constructed on a deviation beyond the authorized limits. but it had been decided by the Board of Trade that such deviation was proper having regard to the interests of P., a landowner, held that P. was not entitled to the costs of moving for an injunction to restrain the Railway Company from so constructing the Railway. (*Pearce v. the Wycombe Railway Company*, 21 Eng. Law and Eq. 1.)

Conveyances.

Form of con-
veyances.

And with respect to the conveyances of lands, be it enacted as follows :

LXXXI. Conveyances of lands to be purchased under the

provisions of this or the special act, or any act incorporated therewith, may be according to the forms in the schedules A. and B. respectively to this act annexed (*l*) or as near thereto as the circumstances of the case will admit, or by deed in any other form which the promoters of the undertaking may think fit; and all conveyances made according to the forms in the said schedules, or as near thereto as the circumstances of the case will admit, shall be effectual to vest the lands thereby conveyed in the promoters of the undertaking, and shall operate to merge all terms of years attendant by express declaration, or by construction of law, on the estate or interests so thereby conveyed, and to bar and to destroy all such estates tail, and all other estates, rights, titles, remainders, reversions, limitations, trusts and interests whatsoever, of and in the lands comprised in such conveyances which shall have been purchased or compensated for by the consideration therein mentioned; but although terms of years be thereby merged, they shall in equity afford the same protection as if they had been kept on foot and assigned to a trustee for the promoters of the undertaking to attend the reversion and inheritance.

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c. 18.
Sect. 82.

(*l*) See forms in Appendix.

LXXXII. The costs of all such conveyances shall be borne by the promoters of the undertaking, and such costs shall include all charges and expenses incurred, on the part as well as of the seller as of the purchaser, of all conveyances and assurances of any such lands, and of any outstanding terms or interests therein, and of deducing, evidencing, and verifying the title to such lands, terms or interests, and of making *out and furnishing such abstracts and attested copies as the promoters of the undertaking may require, and all other reasonable expenses incident to the investigation, deduction and verification of such title (*m*).

Costs of conveyances.

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(*m*) A. was tenant of a copyhold in trust for B. A. died leaving an infant heir. B. sold a part of the property to a railway company: it was held, that the company were not under this section liable to pay the costs of proceedings under the trustee act to obtain a conveyance from the infant. (*Re South Wales Railw. Co.*, 14 Beav. 418.)

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c. 18.

Sect. 83.

Vendor must
pay expense
of neglect as
to legal
estate.

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A landowner contracted with a railway company to sell to them a certain portion of his land; he died, and the legal estate in the lands descended to infants: it was held, that, inasmuch as the vendor, knowing that the purchasers would take that portion of his lands, had not taken measures to prevent the legal estate in the lands, which, from the time of the contract, in equity belonged to the company, descending to infants, he had thereby occasioned the necessity for a suit, in order to procure a conveyance of the legal estate, and that the costs of the suit, as well as the expense of settling the conveyance by the master, must be defrayed out of the purchase money. (*Midland Counties Railw. Co. v. Wescomb*, 2 Railw. C. 211; *Midland Counties Railw. Co. v. Caldecott*, 2 Railw. C. 324; *Ex parte Ommaney*, 10 Sim. 298; *Farrar v. Lord Winterton*, 4 Y. & C. 472.) The same rule was held to be applicable where a landowner, having contracted in writing for the sale of a piece of land to a railway company, died, having devised all his real estate in strict settlement, and a suit was rendered necessary for procuring a conveyance to the company under 1 Will. 4 c. 60. (*Eastern Counties Railw. Co. v. Tufnell*, 3 Railw. C. 133.) In this case V. C. *Wigram* offered to look at the conveyance to save the parties the expense of having it settled by the master.

Taxation of
costs of con-
veyances.

LXXXIII. If the promoters of the undertaking and the party entitled to any such cost shall not agree as to the amount thereof, such costs (*n*) shall be taxed by one of the taxing masters of the Court of Chancery, or by a master in Chancery in Ireland, upon an order of the same court, to be obtained on petition in a summary way by either of the parties; and the promoters of the undertaking shall pay what the said master shall certify to be due in respect of such costs to the party entitled thereto, or in default thereof the same may be recovered in the same way as any other costs payable under an order of the said court, or the same may be recovered by distress in the manner hereinbefore provided in other cases of costs; and the expense of taxing such costs shall be borne by the promoters of the undertak-

ing unless upon such taxation one-sixth part *of the amount of such costs shall be disallowed, in which case the costs of such taxation shall be borne by the party whose costs shall be so taxed, and the amount thereof shall be ascertained by the said master, and deducted by him accordingly in his certificate of such taxation.

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c. 18
Sec 84.

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(n) The Court of Chancery has no jurisdiction upon a special agreement between the parties as to costs. (*Ex parte Great Western Railw. Co.*, 3 Railw. C. 516, *ante* p. 298.)

Entry on Lands.

And with respect to the entry upon lands by the promoters of the undertaking, be it enacted as follows :

LXXXIV. The promoters of the undertaking shall not, except by consent of the owners and occupiers, enter upon any lands which shall be required to be purchased or permanently used for the purposes and under the powers of this or the special act, until they shall either have paid to every party having any interest in such lands (o), or deposited in the bank, in the manner herein mentioned, the purchase money or compensation agreed or awarded to be paid to such parties respectively for their respective interests therein : provided always, that for the purpose merely of surveying and taking levels of such lands, and of probing or boring to ascertain the nature of the soil, and of setting out the line of the works, it shall be lawful for the promoters of the undertaking, after giving not less than 3 nor more than 14 days notice to the owners or occupiers thereof, to enter such lands without previous consent, making compensation for any damage thereby occasioned to the owners or occupiers thereof (p).

Payment of
price to be
made pre-
vious to en-
try, except to
survey, &c.

(o) Where it was objected that the cheque of two directors was not a payment of the purchase money by the company, Lord Abinger, C. B., said, "It is a payment by the company through the two directors who drew the cheque." (*Taylor v. Clemson*, 3 Railw. C. 85; 11 Cl. & F. 610.)

(p) A railway company having power to purchase a plot of land for their railway, entered upon the same to survey and take levels thereof, and to probe or bore to ascertain the nature of the soil, and to set out the centre line of the railway,

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c. 18.
Sect. 84.

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and for that purpose they dug a trig line or trench two inches deep and fourteen inches wide across the plot of land, but they gave the owner of the land no previous notice of such entry as required by this section. Five days after the trig line was made, the owner of the land discovered the fact, and nine days from such discovery, he filed his bill for *an injunction. Upon the affidavits on the part of the company that the surveying and setting out of the line of railway was completed on the day the trig line was made, and that they had no occasion to enter, and did not intend again to enter upon the land until they had taken the legal steps for permanently using it, the court refused the injunction, but reserved the costs. (*Fooks v. Wilts, Somerset and Weymouth Railw. Co.*, 5 Hare 193; 4 Railw. C. 210.)

Where a company, in lawful exercise of the powers given to them by their act, had commenced works upon their own land, which injuriously affected an easement in the enjoyment of the plaintiffs, it was held, upon a bill filed to restrain the company from continuing the works till compensation had been made to the plaintiffs under the provisions of this act, that this section of the act did not refer to the case of damage to the property of another, consequential upon the exercise of the powers of a company upon their own land, but that such cases were governed by the powers of the Railways Clauses Consolidation Act, 1845: it was also held, that under the provisions of the latter act, the company were not bound to make compensation for the damage before commencing the works. (*Hutton v. South Western Railw. Co.*, 13 Jur. 486.) (1)

(1) Under the 12th sec. of the Charter of the Reading Railroad Company, it was held, that the contractors were authorized to enter and occupy with temporary dwellings, stables, blacksmith shops, &c.; the lands adjoining the line of the Road, provided no more was taken than was necessary for such purpose, while engaged in the performance of their contract. (*Landerbrun v. Duffy*, 2 Barr 398.)

Promoters to LXXXV. Provided also, that if the promoters of the un-

dertaking shall be desirous of entering upon and using any such lands before any agreement shall have been come to or an award made, or verdict given for the purchase money or compensation to be paid by them in respect of such lands, it shall be lawful for the promoters of the undertaking to deposit in the bank by way of security, as hereinafter mentioned, either the amount of purchase money or compensation claimed by any party interested in or entitled to sell and convey such lands, and who shall not consent to such entry, or such a sum as shall, by a surveyor appointed by two justices in the manner hereinbefore provided in the case of parties who cannot be found (*q*), be determined to be the value of such lands, or of the interest therein which such party is entitled to or enabled to sell and convey, and also to give to such party a bond, under the common seal of the promoters if they be a corporation, or if they be not a corporation under the hands and seals of the said promoters, or any two of them, with two sufficient sureties to be approved of by two justices in case the parties differ, in a penal sum equal to the sum so to be deposited, conditioned for payment to such party, or for deposit in the bank for the benefit of the parties interested in such lands, as the case may require, under the provisions herein contained, of all *such purchase money or compensation, as may in manner hereinbefore provided be determined to be payable by the promoters of the undertaking in respect of the lands so entered upon, together with interest thereon at the rate of five pounds per centum per annum, from the time of entering on such lands, until such purchase money or compensation shall be paid to such party, or deposited in the bank for the benefit of the parties interested in such lands under the provisions herein contained (*r*); and upon such deposit by way of security being made as aforesaid, and such bond being delivered or tendered to such non-consenting party as aforesaid, it shall be lawful for the promoters of the undertaking to enter upon and use such lands, without having first paid or deposited the purchase money or compensation in other cases required to be paid or deposited by them before entering upon any lands to be taken by them under the provisions of this or the special act (*s*).

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c. 85.

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be allowed to
enter on
lands before
purchase, on
making de-
posit by way
of security
and giving
bond.

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(*q*) *Ante*, s. 58, p. 299.

The instrument by which a surveyor is appointed under
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this section, need not specify either the lands which the surveyor is to value or the course of the railway. The sureties in a bond to be given to the landowner under that section, may be appointed without notice to the landowner; but the money secured by it ought not to be made payable on demand. (*Poynder v. Great Northern Railw. Co.*, 16 Sim. 3.) Although the appointment by the justices of the same person as general valuer of the land as had formerly acted specially on behalf of the company during the negotiations with the landowners was not approved, the court refused to interfere judicially on that account. (*Langham v. Great Northern Railw. Co.*, 5 Railw. C. 263.)

Bonds not in
compliance
with this
section.

(r) The condition of a bond given by a railway company under this section, on taking possession of land before the purchase money was ascertained, was "on demand to pay to the owner, or on demand to deposit in the bank, the amount of such purchase money when determined:" it was held, that the condition was bad, as giving the party claiming to be owner the option of compelling payment either to himself or into the bank, whatever the title might turn out, and an injunction was granted till a proper bond should be executed. (*Poynder v. Great Northern Railw. Co.*, 2 Phill. C. C. 330; 5 Railw. C. 196.)

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A railway company, after fruitless negotiation, and after having given notice of their intention to summon a jury under the 68th section of this act, to settle the amount of compensation to be paid to A. and B. the tenants in common of a piece of land required for the purpose of their railway, proceeded to enter upon the land under the summary powers given by this section. They paid the determined *value into the joint account of A. and B., and delivered a bond conditioned for the payment on demand to A. and B., heirs, executors, administrators, or assigns, or deposit on demand &c., of such purchase money or compensation as might be determined to be payable: it was held, that the payment and the bond given in the above form to persons tenants in common of land, although represented by one solicitor, and

acting together, were irregular. That the words "on demand," inserted in the condition for payment, was not a compliance with the terms of this section. The court thought that what is directed to be done by this section should be done as soon as practicable, and of the mere motion of the company without any demand, and that the omission of the word "their," ought not to be treated as immaterial, although the bond was not decided to be insufficient upon that ground. (*Langham v. Great Northern Railw. Co.*, 5 Railw. C. 263.)

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A bond given under this section with a condition to pay to the landowner, her executors, administrators or assigns, or to deposit in the Bank of England, or otherwise, for the benefit of the parties interested in the property, was held not to be in compliance with the statute, in consequence of the introduction of the words or otherwise. (*Hoskins v. Phillips* 5 Railw. C. 560; 12 Jur. 1030.)

A railway company gave notice under the 18th section of this act, *ante*, p. 258, of their intention to take certain lands, they entered upon a part, and gave security for the alleged value of such portion under this section; but upon motion for an injunction to restrain the company from entering upon the land without making the deposit or giving the security required by this section: it was held, that they had no authority to enter upon part without depositing or giving security for the whole. Although the company were incorporated and gave a bond under this section under their common seal, it was held to be necessary that two sureties should join in the bond. It is incumbent upon those who seek to avail themselves of this section against a landed proprietor, to show clearly and satisfactorily that they have fulfilled its conditions and complied with its requisitions, and if that fact be doubtful, the landed proprietor is entitled to the benefit of the doubt. (*Barker v. North Straffordshire Railw. Co.*, 12 Jur. 324; 5 Railw. C. 401.) *Knight Bruce*, V. C., said, "whatever I may have thought of the case last cited, I consider here that the fact that the person complaining is not in the occu-

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pation of the property, and has not been, and will not be personally inconvenienced by what is done, is not to be disregarded." (*Dakin v. London and North Western Railw. Co.*, 3 De G. & S. 420.)

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A railway company requiring a certain piece of land, held by plaintiff for a term of thirteen years unexpired, gave him the usual notice to treat, and ineffectual attempts were made to settle the price by agreement. Nothing further was done until two years after, when the company gave a bond and deposited the estimated value, and entered into possession. *These proceedings were clearly informal, company and the afterwards deposited the sum claimed by the plaintiff, and delivered a bond for that amount, which recited the quantity of land required, and was conditioned for the payment to him, his executors, administrators or assigns, or into the bank for his or their benefit, of such purchase money or compensation as might be determined to be payable. The plaintiff filed his bill for an injunction: it was held, that the summary powers given by this section are not confined to cases of pressure, and are not effected by the fact that sufficient time has been allowed to elapse for the company to have ascertained the price by award or verdict. That, where the party dealing with the company represents the entirety of a certain interest, it is sufficient that the condition of the bond be for payment to him, his executors, administrators and assigns; and it is not necessary that the bond should contain the alternative "for the parties interested in such lands." That a recital in the bond of the quantity of land required out of a certain larger piece, is sufficient description to satisfy the terms of this section. That an entry into the possession of land began wrongfully does not preclude a company continuing in possession when they have done all that was originally required to render their entry rightful. It was questioned from what date, whether from the date of the trespass or from the date of the rightful possession, interest on the purchase money would be payable by the company. (*Willey v. South East*

ern Railw. Co., 6 Railw. C. 100; 1 Mac. & G. 58; 1 Hall 8 & 9 Vict.
& T. 56.) c. 18.

Sect. 55.

A railway company, being desirous of taking land under this section, paid into court the amount at which the land was valued by the surveyor, and also gave the owner of the land the bond prescribed by this section. Subsequently, the amount at which the land was valued by the jury was paid by the promoters and the bond returned to them; they now petitioned to have the money returned which they had paid into court. The owner of the land opposed the petition, on the ground that the petitioners had not yet paid the costs of investigating the title, of the conveyance, of the inquiry before the jury, and of a suit by the owner in another branch of the court for an injunction, which the promoters had rendered necessary: it was held by the Lord Chancellor granting the prayer of the petition, and reversing the decision of *Shadwell*, V. C., that the company were entitled to the payment out to them of the deposit, and that the costs of the suit were not costs provided for by the act, and that they should be disposed of by that branch of the court to which the suit was attached; and that, as to the other costs, the court had no discretion, under the 80th section of this act, to order them to be paid out of the fund in court, the remedy as to those costs being otherwise and fully provided for by the act. (*Ex parte Great Northern Railw. Co.*, 12 Jur. 885; Law. J. 1848, Chanc. 314; 5 Railw. C. 269; 16 Sim. 169.)

Payment of
deposit to
the company.

The sum deposited by a railway company in court under *this section is not subject to any lien for the costs of the vendor, but upon due performance of the condition of the bond mentioned in the same section, the company are entitled to have the money paid out to them, notwithstanding the pendency of a question between them and the vendor with respect to such costs. A party served with a petition does not forfeit his right to the costs of his appearance, merely because his counsel at the hearing has raised an unsuccessful opposition to the prayer (*Ex parte Stevens*, re

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London and South Western Railw. Extension Act, 2 Phill. C. C. 772; 5 Railw. C. 437.) The proceedings under this section are not necessarily invalid, because the award was signed on a day subsequent to the day on which the money was paid into court and the bond given. (*Stamks v. The Birmingham, Wolverhampton, and Stour Valley Railw. Company*, 7 Hare 256; 6 Railw. C. 123; 2 Phill. C. C. 673.)

Entry upon
lands with-
out notice.

(s) It is not necessary for a company acting under this section to give notice to the party with whom they are dealing for the lands. A railway company, without agreeing for the purchase of certain lands scheduled in their act, and without notice to the owners under this section, deposited the value in the bank, and delivered a bond, and were about to enter on the lands when the owners filed a bill and applied for an injunction: it was held on appeal, affirming the decision of *Shadwell*, V. C., that the company were right in their proceedings, and, no injury being alleged, the application was refused with costs. (*Bridges v. Wilts, Somerset and Weymouth Railw. Co.*, 4 Railw. C. 622.) Lord *Cottenham*, C., observed, the question being whether notice is required or not by this section, and finding that where notice is required the act so expresses it, and there being also a reference to a proceeding where no notice is required, it is evident there can be no notice necessary in the present case. The reference to the 59th section in the 85th section makes this clear. No doubt there is a difficulty as to the bond, because there are sureties. I cannot however separate the two cases. The sureties are to be approved, if the parties differ. If the parties had differed, the jurisdiction of the justices would have arisen; but all that is said is, that there was no opportunity for raising the discussion. Parties applying for an injunction must show some injury. In the situation in which the plaintiff was placed, he had no cause for differing, neither does he now allege any. The provisions of the act have been complied with, and the company are entitled to take possession of the land. (*Bridges v.*

Wills, Somerset and Weymouth Railw. Co., 4 Railw. C. 622; 11 Jur. 315; Law J. 1847, Ch. 335.)

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c. 18.

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Where the promoters of a railway company have, within three years after the passing of their special act, entered upon land by virtue of this section, the mere fact of the purchase and compensation not being completed within the three years does not render the possession of the company, after the three years, unlawful. (*Worsley v. South Devon Railw. Co.*, 15 Jur. 970; 20 L. J. Q. B. 254; 16 Q. B. 539.)

*The ascertaining the amount of compensation after lands have been entered upon and taken under this section is no exercise of a compulsory power on the part of the company. (*Doe d. Armistead v. North Staffordshire Railw. Co.*, 15 Jur. 944; 20 L. J. Q. B. 249; 16 Q. B. 526.) The 68th section applies to the case of lands entered upon and used under the 85th section, and the landowner is in such case bound to initiate proceedings for settling the compensation. (*Ib.*)

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Where a railway company have complied with the provisions of this section, and have entered upon and taken land within the prescribed period for exercising their compulsory powers, their continuance in possession after the prescribed period, without having the compensation assessed, and the land conveyed to them, is not unlawful, and an ejectment cannot be maintained against them under such circumstances. (*Ib.*)

Possession
without pay-
ment of com-
pensation.

A. was the owner of a field, the whole of which was contained in the books of reference of a railway company, but fifteen perches of it lay beyond the limits of deviation laid down in the plans. The company served a notice upon A., requiring part of the field for the purpose of the railway. A. then gave notice to the company that if they took part they must take the whole, to which they agreed. A. afterwards receded from his notice. The company then entered upon the whole under this section: it was held, that the question whether the fifteen perches were necessary for the

8 & 9 VICT. works was for the jury, and also that A. having required
 c. 18. the company to take the whole, could not object that their
 Sect. 85. entry on that portion was unlawful. (*Ib.*)

Injunction
 refused
 under this
 section.

Under this section a railway company have the power of entering upon and using land on certain conditions, and if these conditions are complied with, the Court of Chancery will not interfere by injunction, although the company have given notice of their intention to issue a warrant for summoning a jury. (*Langham v. Great Northern Railw. Co.*, 5 Railw. C. 263; 1 De G. & S. 486.) The Court of Chancery will grant an injunction to restrain a railway company from taking proceedings under this section, without leave, to obtain the possession of lands in the possession of a receiver appointed by the court. (*Tick v. Rundle*, 10 Beav. 318.) The company are not prohibited from executing the works which occasion the damage before the amount of compensation for the same is ascertained, paid or deposited. (*Hutton v. London and South Western Railw. Co.*, 7 Hare 259. See *Lister v. Lobley*, 7 Ad. & E. 124.)

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Before the amount to be paid by a railway company, for land required by them for the purpose of their railway, had been determined, a verbal consent by one party stated to be qualified, by the other alleged to be general, was given whereupon the railway company entered upon the land and commenced the works which would permanently affect it: it was held, that the court would not interfere by injunction to stop the works, if perfect justice can be done by compelling the company to *pay for the land; but will order the proximate value to be deposited until the amount be determined. (*Langford v. Brighton, Lewes and Hastings Railw. Co.*, 4 Railw. C. 69.) As to necessity of licence in writing for permanent taking of land, *Wood v. Ledbitter*, 13 Mees. & W. 838.

A railway company had power to take land for their line, such power to expire within three years. The company gave a notice, and they executed the bond under this section, and paid the purchase money into the bank, but did

not within the three years take possession. The company then obtained an extended act, but containing similar powers as in the former act, and gave a new notice to take land. No money was deposited under the new notice, nor was a new bond executed, and then the company entered on the land. The landowner filed a bill, and moved for an injunction to prevent the company from proceeding with their line over the plaintiff's land, but the motion was refused, as the company had power under the second act of parliament to take proceedings for acquiring the land, but liberty was granted to the plaintiff to bring an action. (*Williams v. South Wales Railw. Co.*, 13 Jur. 443.)

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A railway company, under the powers of their act, gave notice to the lessees of a factory and buildings that they required a part of their premises. The lessees thereupon gave a counter notice, requiring the company under the 92d section of this act to take the whole. The company took no further proceedings until the lease of the premises had expired. The lessees having remained in possession of the premises, the railway company without serving any new notice on the defendants, had the value of their interest in the whole of the premises assessed, deposited the amount in court, delivered a bond, and entered into possession of part of the premises under this section. The defendants conceiving that the company had no right to proceed under this section, sent in a claim, and gave them notice to issue their warrant to the sheriff to summon a jury to assess compensation under the 68th section. Negotiation had been entered into by the reversioners with the company and with the defendants, which rendered it doubtful to what interest in the premises the latter were entitled. An injunction was granted to restrain proceedings by the defendants under the 68th section until the rights of the several parties had been ascertained. (*South Western Railw. Co. v. Coward*, 5 Railw. C. 703.)

Injunction
granted until
rights of par-
ties ascer-
tained.

Money is paid into court under this section for the vendor's protection; and, therefore, where a railway company

8 & 9 VICT. c. 18. Sect. 86. have paid the estimated value of land into court under this section, and afterwards completed the purchase by contract, the court will not order the payment out to the company of the sum deposited, unless the vendor join in the petition or be served with a copy of it. (*Ex parte South Wales Railw. Co.*, 6 Railw. C. 151. See *Ex parte Eastern Counties Railw. Co.*, 5 Railw. C. 210, *ante*, p. 337.)

[*341] *LXXXVI. The money so to be deposited as last aforesaid shall be paid into the bank in the name and with the privity of the accountant-General of the Court of Chancery in England or the court of Exchequer in Ireland, to be placed to his account there to the credit of the parties interested in or entitled to sell and convey the lands so to be entered upon and who shall not have consented to such entry, subject to the control and disposition of the said court; and upon such deposit being made, the cashier of the bank shall give to the promoters of the undertaking, or to the party paying in such money by their direction, a receipt for such money, specifying therein for what purpose and to whose credit the same shall have been paid in. (t).

Upon deposit being made it being made cashier to give receipt.

(t) Money paid into the Bank of England under this section, to the credit of *ex parte* the promoters of the undertaking, the account of the landowner, was held to be rightly paid in. (*Poynder v. Great Northern Railw. Co.*, 16 Sim. 3.)

Deposit to remain as a security and to be applied under the direction of the court. LXXXVII. The money so deposited as last aforesaid shall remain in the bank, by way of security to the parties whose lands shall so have been entered upon for the performance of the condition of the bond to be given by the promoters of the undertaking, as hereinbefore mentioned, and the same may, on the application by petition of the promoters of the undertaking be ordered to be invested in bank annuities or government securities, and accumulated; and upon the condition of such bond being fully performed it shall be lawful for the Court of Chancery in England or the Court of Exchequer in Ireland, upon a like application, to order the money so deposited, or the funds in which the same shall have been invested, together with the accumulation thereof to be repaid or transferred to the promoters of the undertaking, or if such condition shall

not be fully performed, it shall be lawful for the said court to order the same to be applied in such manner as it shall think fit for the benefit of the parties for whose security the same shall so have been deposited.

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c. 18.
Sect. 88.

LXXXVIII. If at any time the company be unable, by reason of the closing of the office of the accountant general of the Court of Chancery in England or the Court of Exchequer in Ireland, to obtain his authority in respect of payment of any sum of money so authorized to be deposited in the bank by way of security as aforesaid, it shall be lawful for the company as to pay *into the bank to the credit of such party or matter as the case may require (subject nevertheless to being dealt with hereinafter provided and not otherwise), such sum of money as the promoters of the undertaking shall, by some writing signed by their secretary or solicitors for the time being, addressed to the governor and company of the bank in that behalf, request, and upon any such payment being made, the cashier of the bank shall give a certificate thereof; and in every such case, within ten days after the reopening of the said accountant general's office, the solicitor for the promoters of the undertaking shall there bespeak the direction for the payment of such sum into the name of the accountant general, and upon production of such direction at the Bank of England, the money so previously paid in shall be placed to the credit of the said accountant general accordingly, and the receipt for the said payment be given to the party making the same in the usual way for the purpose of being filled at the report office.

The company may pay the deposit money into the bank by way of security during the time that the office of the accountant general is closed.

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LXXXIX. If the promoters of the undertaking or any of their contractors shall except as aforesaid, wilfully (*u*) enter upon and take possession of any lands which shall be required to be purchased or permanently used for the purposes of the special act, without such consent as aforesaid, or without having made such payment for the benefit of the parties interested in the lands, or such deposit by way of security as aforesaid, the promoters of the undertaking shall forfeit to the party in possession of such lands, the sum of ten pounds, over and above the amount of any damage done to such lands by reason of such entry and taking possession as aforesaid, such penalty and damage respectively to be recovered before to justices; and if the promoters of the undertaking or their contractors shall, after conviction in such penalty as aforesaid,

Penalty on the promoters of the undertaking entering upon lands without consent before payment of the purchase money.

8 & 9 VICT.
c. 18.
Sect. 89.

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continued in unlawful possession, of such lands, the promoters of the undertaking shall be liable to forfeit the sum of twenty-five pounds for every day they or their contractors shall so remain in possession as aforesaid, such penalty to be recoverable by the party in possession of such lands, with costs, by action in any of the superior courts: provided always, that nothing herein contained shall be held to subject the promoters of the undertaking to the payment of any such penalties as aforesaid, if they shall *bona fide* and without collusion have paid the compensation agreed or awarded to be paid in respect of the said lands to *any person whom the promoters of the undertaking many have reasonably believed to be entitled thereto, or deposited the same in the bank for the benefit of the parties interested in the lands, or made such deposit by way of security in respect thereof as hereinbefore mentioned, although such person may not have been legally entitled thereto (v).

Case on similar enactment.

(u) An act of parliament enabled a railway company to take land for the purpose of the railway, the amount of compensation to the owners to be assessed by a jury, if no agreement could be come to respecting it, and empowering the company in certain cases to deposit the purchase money or compensation in the Court of Chancery, to the credit of the party entitled to the same. A subsequent section enacted that if the company should wilfully take possession of any land without having made payment or deposit, they should be liable to a penalty, and if they, after the conviction or notice from the party in possession, should continue in unlawful occupation of any lands, they should forfeit 25*l.* for each day while they continued in possession. At the end of this section there was a proviso that the company should not be subject to such penalties if *bona fide* and without collusion they should pay or deposit the compensation money to a wrong party whom they reasonably believed entitled to it. The company having *bona fide* and without collusion, but without complying with the requisites of the statute, taken possession of certain land belonging to the plaintiff, and deposited the compensation money for his use: it was held, that they were protected by the proviso against the penalties

given in the first part of the section; for sections like the above, which may be justly called penal, should be strictly construed but a proviso, which has the effect of saving parties from penal enactments, should be liberally construed. (*Hutchinson v. Manchester, Bury and Rossendale Railw. Co.* 15 Mee. & W. 314; Law. J. 1846, Exch. 293; 10 Jur. 361; 3 Railw. C. 748). It was also held, that the word "wilfully" in the above clause applied only to the first branch of it. (*Id.*)

8 & 9 Vict.
c. 18.
Sect. 89.

(v) A corporation, having under an act of parliament the right to take land for the purpose of certain public works, gave notice to the owner of the inheritance of an intention to take it. They then entered regularly upon the land, for the purpose of surveys, &c., and afterwards their contractors, without the knowledge of the corporation, but with the assent of the occupying tenants, brought some waggons and rails and other implements on the land, and their left them but did not commence the works, or do any damage. This was done without obtaining the plaintiff's assent; but it became known to his agent in the course of December. In the beginning of the following February, without any previous communication with the defendants, he filed his bill for an injunction to restrain them from allowing the waggons, &c. to remain on the land, and from taking possession of the land until they had complied with the provisions of *this act: it was held, that though the corporation were bound by the acts of their contractors, the acts done were not a taking possession within the meaning of this act, and the bill was improperly filed. (*Standish v. Mayor of Liverpool*, 1 Drewry, 1).

Acts not
amounting to
taking pos-
session

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An action of trespass will lie against a railway company for entering upon land, through which the permanent tunnel is to pass, without having before entry, paid the compensation due to the owners of such land. (*Ramsden v. Manchester and South Junction, and Altrincham Railw. Co.*, 5 Railw. C. 552; 1 Exch 723. See *Sparrow v. Oxford*,

8 & 9 VICT. *Worcester, &c. Railway Co.*, 7 Railw. C. 125, *post*, p. 346.)
 c. 18.

Sect. 90.

Decision of
 justices not
 conclusive
 as to the
 right of the
 promoters.

XC. On the trial of any action for any such penalty as aforesaid, the decision of the justices under the provisions hereinbefore contained shall not be held conclusive as to the right of entry on any such lands by the promoters of the undertaking.

Proceedings
 in case of
 refusal to
 deliver pos-
 session of
 lands.

XCI. If in any case in which, according to the provisions of this or the special act, or any act incorporated therewith, the promoters of the undertaking are authorized to enter upon and take possession of any lands required for the purposes of the undertaking the owner or occupier of any such lands or any other person refuse to give up the possession thereof, or hinder the promoters of the undertaking from entering upon or taking possession of the same, it shall be lawful for the promoters of the undertaking to issue their warrant to the sheriff to deliver possession of the same to the person appointed in such warrant to receive the same, and upon the receipt of such warrant the sheriff shall deliver possession of any such lands accordingly, and the costs accruing by reason of the issuing and execution of such warrant, to be settled by the sheriff, shall be paid by the person refusing to give possession, and the amount of such costs shall be deducted and retained by the promoters of the undertaking from the compensation, if any, then payable by them to such party, or if no such compensation be payable to such party or if the same be less than the amount of such costs, then such costs, or the excess thereof beyond such compensation, if not paid on demand, shall be levied by distress, and upon application to any justice for that purpose he shall issue his warrant accordingly.

Parties not to
 be required
 to sell part of
 a house.

XCII. That no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof. (x).

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Obligation of
 company to
 purchase
 whole pro-
 perty.

*(x) Under this act, if the promoters of the undertaking demanded a compulsory sale of premises, the owner by this section may refuse to sell less than the whole; but if they have given notice of requiring a part, the owner cannot, by

reason of such notice, require the whole to be taken, and the promoters, on his refusal to sell part, may abandon the purchase. (*Reg. v. London and South Western Railw. Co.*, 12 Q. B. 775. See *Stone v. Commercial Railw. Co.* 9 Sim. 621; 1 Railw. C. 375; *ante*, pp. 237- 239.)

8 & 9 VICT.
c. 18.
Sect. 92.

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A railway company gave notice to landowners, under the 18th section of this act, that they required to purchase part of certain premises. The owners of the premises thereupon gave notice to the company, under this section, that they required them to purchase the whole of the premises, and a mandamus was obtained, commanding the company to issue their precept for summoning a jury to assess compensation for the whole: it was held, that, although this section protects the owners from being obliged to sell a part, it does not compel a company, wanting a part only, to take the whole, and that the mandamus having claimed the whole, could not go for a part only. (*Reg. v. London and South Western Railw. Co.*, 5 Railw. C. 669; Law. J. 1848 Q. B. 326; 12 Jur. 973.)

A company gave notice to take a portion of property, and issued a warrant to assess the value and compensation. The landowner filed a bill for an injunction to restrain the company from taking the land, without taking the whole, on the ground that the whole formed part of a manufactory within this section. The company insisted that the plaintiff by a former suit, to compel them to take a part of the land, had precluded himself from insisting on this section, but was bound to take compensation under the 49th or 68th sections of this act. The court granted an injunction to restrain the company from proceeding before the jury until further order; but gave the company the right to try at law whether their notice was intended to include any part of the manufactory within the intent and meaning of this section. Lord Cottenham, C., discharged the injunction on the ground that a party who, having known his rights, and having had his claim disposed of, then raises a new ground of inquiry, does not present his case in such a form as to entitle him to ask

What is part
of a manu-
factory.

8 & 9 VICT.
c. 18.

Sect. 92.

for the extraordinary interposition of the court. Besides, there was strong evidence to the effect that the property in question, consisting of parcels of land, on one of which was a brine pit and steam engine, connected with certain salt works, was not generally understood to be part of a manufactory; and it is clear that this section is not intended to protect property not being part of a manufactory. (*Barker v. North Staffordshire Railw. Co.*, 5 Railw. C. 401; 12 Jur. 575; 2 De G. & S. 60.)

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A special railway act incorporated so much of this act as was not inconsistent with it. It also provided, that such parts of the line as passed through a certain specified piece of land should be arched over, so as to afford to the owner *a communication between the severed portions. It was held that this provision was not inconsistent with, and therefore did not exclude the operation of this section. Land included in the same wall with tin plate works, and used for the deposit of ashes from the works, was held to be part of the manufactory within this section, although the two portions of property were *separated* by a road, over which a stranger had a right of way. Where a company had given notice to take part of a manufactory, and were required to take the whole under this section, it was held, that they could not escape from the necessity of so doing by changing their plan, and passing under the part comprised in their notice by a tunnel whether such proceeding would amount to taking a part of a manufactory or not. (*Sparrow v. Oxford, Worcester, &c., Railw. Co.*, 12 De G. M. & G. 94; 9 Hare 436; 7 Railw. C. 92.)

A. was lessee for years of a house and of a warehouse, between which was a yard, over which he had a right of way granted by the same demise. B. was the occupier as under-lessee. A railway company proposed to take the warehouse, and gave notice, and paid a sum into court, and gave a bond conditioned to pay compensation money to A., the lessee, "her heirs, executors, or administrators," and then took possession of the warehouse, which they began to pull down. A., the lessee, filed her bill against the com-

pany, and moved for an injunction to restrain the company from continuing in possession and from proceeding to pull down the warehouse, contending that under this section the defendants were bound to take the whole of the premises. B., the under-lessee, was no party to the suit. The court refused to interfere by injunction, and directed a case for the opinion of a court of law. (*Dakin v. London and North Western Railw. Co.*, 13 Jur. 579; 3 De G. & S. 414.)

8 & 9 Vict.
c. 18.
Sect. 92.

Intersected Lands.

And with respect to small portions of intersected land, be it enacted as follows :

XCII. If any lands not being situate in a town or built upon shall be so cut through or divided by the works as to leave either on both sides or on one side thereof, a less quantity of land than half a statute acre, and if the owner of such small parcel of land require the promoters of the undertaking to purchase the same along with the other land required for the purposes of the special act, the promoters of the undertaking shall purchase the same accordingly, unless the owner thereof have other land adjoining to that so left into which the same can be thrown, so as to be conveniently occupied therewith; and if such owner have any other lands so adjoining, the promoters of the undertaking shall, if so required by the owner, at their own expense, throw the piece of land so left into such adjoining land, by removing the fences and levelling the sites thereof, and by soiling the same in a sufficient and workmanlike manner.

Owners of intersected lands may insist on sale.

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XCIV. If any such land (*y*) shall be so cut through and divided as to leave on either side of the works a piece of land of less extent than half a statute acre, or of less value than the expense of making a bridge, culvert, or such other communication between the land so divided as the promoters of the undertaking are, under the provisions of this or the special act, or any act incorporated therewith, compellable to make, and if the owner of such lands have not other lands adjoining such piece of land, and require the promoters of the undertaking to make such communication, then the promoters of the undertaking may require such owner to sell to them such piece of land, and any dispute as to the value of such piece of land, or as to what would be the expense of

Promoters of the under-taking may insist on purchase where expenses of bridges, &c., exceeds the value.

8 & 9 Vict.
c. 18

Sect. 95.

making such communication, shall be ascertained as herein provided for cases of disputed compensation: and on the occasion of ascertaining the value of the land required to be taken for the purposes of the works, the jury or the arbitrators, as the case may be, shall, if required by either party, ascertain by their verdict or award the value of any such severed piece of land, and also what would be the expense of making such communication.

(y) The words "such land" in this section refer to the general heading of the enactment, and do not refer to land in a town, or land built upon, mentioned in the 93d section. (*Falls v. Belfast and Ballymena Railw. Co.*, 11 Ir. Law R. 184.)

Copyholds.

And with respect to copyhold lands, be it enacted as follows:

Conveyance
of copyhold
lands to be
enrolled.

XCV. Every conveyance to the promoters of the undertaking, of any lands which shall be of copyhold or customary tenure, or of the nature thereof, shall be entered on the rolls of the manor of which the same shall be held or parcel; and on payment to the steward of such manor of such fees as would be due to him on the surrender of the same lands to the use of a purchaser thereof he shall make such enrolment; and every such conveyance, when so enrolled, shall have the like effect, in respect of such copyhold or customary lands, as if the same had been of freehold tenure, nevertheless, until such land shall have been enfranchised by virtue of the powers hereinafter contained, they shall continue subject to the same fines, rents, heriots, and services as were theretofore payable and of right accustomed (z).

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(z) Where copyhold land is taken by a railway company under this act, the steward of the manor is bound to enrol the conveyance required by it on payment of such fees only as would be due to him on a surrender of the land to the use of a purchaser, and has not any claim for the fee due on admittance also. (*Cooper v. Norfolk Railw. Co.*, 3 Exch. 546; 6 Railw. C. 94; 13 Jur. 195; Law J. 1849, Exch. 176.)

XCVI. Within three months after the enrolment of the conveyance of any such copyhold or customary lands, or within one month after the promoters of the undertaking shall enter upon and make use of the same for the purposes of the works, whichever shall first happen, or if more than one parcel of such lands holden of the same manor shall have been taken by them, then within one month after the last of such parcels shall have been so taken or entered on by them, the promoters of the undertaking shall procure the whole of the lands holden of such manor so taken by them to be enfranchised, and for that purpose shall apply to the lord of the manor whereof such lands are holden to enfranchise the same, and shall pay to him such compensation in respect thereof as shall be agreed upon between them and him, and if the parties fail to agree respecting the amount of the compensation to be paid for such enfranchisement, the same shall be determined as in other cases of disputed compensation; and in estimating such compensation the loss in respect of the fines, heriots, and other services payable on death, descent, or alienation, or any other matters which would be lost by the vesting of such copyhold or customary lands in the promoters of the undertaking, or by the enfranchisement of the same, shall be allowed for (a).

8 & 9 VICT.
c. 18.

Sect 9:
Copyhold
lands to be
enfranchised.

(a) The case of *Dimes v. Grand Junction Canal Co.*, (5 Railw. C. 34; 9 Q. B. 469), may be referred to, as showing that the conveyance of a copyholder to a company transfers only such interest as the tenant can convey without the lord's concurrence, and that if an incorporated company choose to rest contented with the title of the copyhold tenant, without purchasing that of the lord, the company are in a similar situation at law to that in which they would be placed by purchasing a long term of years, and leaving the reversion in fee outstanding. (See *Rex v. Stainforth and Keudby Canal Co.*, 1 Maule & S. 32.)

*By an act of parliament, under which an incorporated company had power to purchase land for the formation of a canal, persons having property upon the line of the canal were to convey any right, title or interest in such property to the company conveyance in the form pointed out by the act.

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c. 18.
Sect. 97.

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A copyholder in fee conveyed under the act his interest in certain lands to the company. Upon the death of the copyholder the lord of the manor refused to admit his heir, or the canal company. It was held, that the heir of the copyhold ought to be admitted by the lord to the copyhold premises, and that such heir, when admitted, was to hold as trustee for the company, who were to pay the fines and fees upon the admittance; for although the conveyance did not convey the legal copyhold estate, yet, being for valuable consideration, the tenant of the estate became the trustee of the copyhold for the company. (*Grand Junction Canal Co. v. Dimes*, Law J. 1847; Ch. 148; S. C. 15 Sim. 402; 2 Mac. & G. 285; 2 Hall & T. 92; 19 Law T. 317.)

Lord of the
manor to en-
franchise on
payment of
compensa-
tion.

XCVII. Upon payment or tender of the compensation so agreed upon or determined, or on deposit thereof in the bank in any of the cases hereinbefore in that behalf provided, the lord of the manor whereof such copyhold or customary lands shall be holden shall enfranchise such lands, and the lands so enfranchised shall for ever thereafter be held in free and common socage (b); and in default of such enfranchisement by the lord of the manor, or if he fail to adduce a good title thereto to the satisfaction of the promoters of the undertaking, it shall be lawful for them, if they think fit, to execute a deed-poll, duly stamped, in the manner hereinbefore provided in the case of a purchase of lands by them (c), and thereupon the lands in respect of the enfranchisement whereof such compensation shall have been deposited as aforesaid shall be deemed to be enfranchised, and shall be for ever thereafter held in free and common socage.

(b) See 8 & 9 Vict. c. 18, s. 81, p. 331.

(c) Ib. s. 75, p. 317.

Apportion-
ment of
copyhold
rents

XCVIII. If any such copyhold or customary lands be subject to any customary or other rent, and part only of the lands subject to any such rent be required to be taken for the purpose of the special act, the apportionment of such rent may be settled by agreement between the owner of the lands and the lord of the manor on the one part, and if such apportionment be not so settled by agreement, then the same shall be settled

by two justices ; and the enfranchisement of any copyhold or customary lands taken by virtue of *this or the special act, or the apportionment of such rents, shall not affect in other respects any custom by or under which any such copyhold or customary lands not taken for such purposes shall be held ; and if any of the lands so required be released from any portion of the rent to which they were subject jointly with any other lands, such last-mentioned lands shall be charged with the remainder only of such rents ; and with reference to any such apportioned rents, the lord of the manor shall have all the same rights remedies over the lands to which such apportioned rent shall have been assigned or attributed as he had previously over the whole of the lands subject to such rents for the whole of such rents.

8 & 9 Vict.
c. 18.

Sect 99

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Common Lands.

And with respect to any such lands being common or waste lands, be it enacted as follows :

XCIX. The compensation in respect of the right in the soil of any lands subject to any rights of common shall be paid to the lord of the manor, in case he shall be entitled to the same, or to such party, other than the commoners, as shall be entitled to such right in the soil : and the compensation in respect of all other commonable and other rights in or over such lands, including therein any commonable or other rights to which the lord of the manor may be entitled, other than his right in the soil of such lands, shall be determined and paid and applied in manner hereinafter provided with respect to common lands the right in the soil of which shall belong to the commoners ; and upon payment or deposit in the bank of the compensation so determined all such commonable and other rights shall cease and be extinguished.

Compensation for common lands, where held of a manor &c., how to be paid.

C. Upon payment or tender to the lord of the manor, or such other party as aforesaid, of the compensation which shall have been agreed upon or determined in respect of the right in the soil of any such lands, or on deposit thereof in the bank in any of the cases hereinbefore in that behalf provided, such lord of the manor, or such other party as aforesaid, shall convey such lands to the promoters of the undertaking, and such conveyance shall have the effect of vesting such lands in the promoters of the undertaking, in

Lord of the manor, &c., to convey to the promoters of the undertaking, on receiving compensation for his interest.

8 & 9 Vict.
c. 18.

Sect 101.

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like manner as if such lord of the manor, or such other party as aforesaid, had been seised in fee simple of such lands at the time of executing such conveyance; and in default of such conveyance, *it shall be lawful for the promoters of the undertaking, if they think fit, to execute a deed-poll, duly stamped, in the manner hereinbefore provided in the case of the purchase of lands by them, and thereupon the lands in respect whereof such last-mentioned compensation shall have been deposited as aforesaid shall vest absolutely in the promoters of the undertaking, and they shall be entitled to immediate possession thereof, subject nevertheless to the commonable and other rights theretofore affecting the same, until such rights shall have been extinguished by payment of deposit of the compensation for the same in manner hereinafter provided.

Compensation for common lands, where not held of a manor how to be ascertained.

CI. The compensation to be paid with respect to any such lands, being common lands, or in the nature thereof, the right to the soil of which shall belong to commoners, as well as the compensation to be paid for the commonable and other rights in or over common lands the right in the soil whereof shall not belong to the commoners, other than the compensation to the lord of the manor, or other party entitled to the soil thereof, in respect of his right in the soil thereof, shall be determined by agreement between the promoters of the undertaking and a committee of the parties entitled to commonable or other rights in such lands, to be appointed as next hereinafter mentioned.

A meeting of the parties interested to be convened.

CII. It shall be lawful for the promoters of the undertaking to convene a meeting of the parties entitled to commonable or other rights over or in such lands to be held at some convenient place in the neighborhood of the lands, for the purpose of their appointing a committee to treat with the promoters of the undertaking for the compensation to be paid for the extinction of such commonable or other rights; and every such meeting shall be called by public advertisement to be inserted once at least in two consecutive weeks in some newspaper circulating in the county or in the respective counties and in the neighborhood in which such lands shall be situate, the last of such insertions being not more than fourteen nor less than seven days prior to any such meeting; and notice of such meeting shall also, not less than seven days pre-

vious to the holding thereof, be affixed upon the door of the parish church where such meeting is intended to be held, or if there be no such church, some other place in the neighborhood to which notices are usually affixed; and if such lands be parcel or holden of a manor, a like notice shall be given to the lord of such manor.

8 & 9 Vict.
c. 18

Sect. 103.

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*CIII. It shall be lawful for the meeting so called to appoint a committee, not exceeding five in number, of the parties entitled to any such rights; and at such meeting the decision of the majority of the persons entitled to commonable rights present shall bind the minority and all absent parties.

Meeting to
appoint a
committee.

CIV. It shall be lawful for the committee so chosen to enter into an agreement with the promoters of the undertaking for the compensation to be paid for the extinction of such commonable and other rights, and all matters relating thereto for and on behalf of themselves and all other parties interested therein; and all such parties shall be bound by such agreement; and it shall be lawful for such committee to receive the compensation so agreed to be paid, and the receipt of such committee, or of any three of them, for such compensation, shall be an effectual discharge for the same; and such compensation, when received, shall be apportioned by the committee among the several persons interested therein according to their respective interests, but the promoters of the undertaking shall not be bound to see to the apportionment or to the application of such compensation, nor shall they be liable for the misapplication or nonapplication thereof.

Committee to
agree with
the promoters
of the under-
taking.

CV. If upon such committee being appointed they shall fail to agree with the promoters of the undertaking as to the amount of the compensation to be paid as aforesaid, the same shall be determined as in other cases of disputed compensation.

Disputes to
be settled as
in other
cases.

CVI. If, upon being duly convened by the promoters of the undertaking, no effectual meeting of the parties entitled to such commonable or other rights shall take place, or if, taking place, such meeting fail to appoint such committee, the amount of such compensation shall be determined by a surveyor to be appointed by two justices, as hereinbefore provided in the case of parties who cannot be found.

If no commit-
tee be ap-
pointed, the
amount to be
determined by
a surveyor.

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c. 18.

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Upon pay-
ment of com-
pensation
payable to
commoners,
the lands to
vest.

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CVII. Upon payment or tender to such committee, or any three of them, or if there shall be no such committee, then upon deposit in the bank in the manner provided in the like case of the compensation which shall have been agreed upon or determined in respect of such commonable or other rights, it shall be lawful for the promoters of the undertaking, if they think fit, to execute a deed-poll, duly stamped, in the manner hereinbefore provided in the case of the purchase of lands by them; and thereupon the lands in *respect of which such compensation shall have been so paid or deposited shall vest in the promoters of the undertaking, freed and discharged from all such commonable or other rights, and they shall be entitled to immediate possession thereof; and it shall be lawful for the Court of Chancery in England or the Court of Exchequer in Ireland, by an order to be made upon petition, to order payment of the money so deposited to a committee to be appointed as aforesaid, or to make such other order in respect thereto, for the benefit of the parties interested, as it shall think fit (*d*).

Suit by as-
signee of
compensa-
tion money,

(*d*) By several acts of parliament establishing and giving additional powers to a canal company, a committee of the company was empowered, in case any person who should agree with the company for the sale of any common or waste land should be unable to make out a good title to the satisfaction of the committee, or if the person entitled to any common or waste land could be known, to cause the purchase money to be invested in a certain manner or paid into the Court of Chancery for the benefit of the parties interested therein. In 1812 the company contracted for the purchase of a piece of land on P. Common with S., whose title was not then considered to be satisfactory. The company entered into possession of the land, but they refused to pay S. the purchase money and they never paid it into court or invested it. In 1813, S. assigned all his interest to C. In 1827 an act passed for the inclosure of P. Common; and in 1837, by the award of the commissioner appointed by the act, C. and four other persons were ascertained to be the owners in certain proportions of the land in question. Shortly after entering into the contract with S. the company became in insolvent circumstances

and so continued until 1836, when their canal and property were purchased by a railway company under an act of parliament, which provided that the purchase money should be applied in payment of the debts and liabilities of the canal company. Upon a bill filed in 1837 by C. against the canal company and the four other interested parties, it was held, that the company were trustees of the purchase money for S. and his assigns, and that C. was not barred by lapse of time, and had not been guilty of laches in not filing his bill at an earlier period. (*Cator v. Croydon Canal Co.*, Law J. 1844, Ch. 89, 8 Jur. 277; 4 Y & C. 405.)

8 & 9 VICT.
c. 18.
Sect. 108.

Lands in Mortgage.

And with respect to lands subject to mortgage, be it enacted as follows:

CVIII. It shall be lawful for the promoters of the undertaking to purchase or redeem the interest of the mortgagee of any such lands which may be required for the purposes of the special act, and that whether *they shall have previously purchased the equity of redemption of such lands or not, and whether the mortgagee thereof be entitled thereto in his own right or in trust for any other party, and whether he be in possession of such lands by virtue of such mortgage or not, and whether such mortgage affect such lands solely or jointly with any other lands not required for the purposes of the special act, and in order thereto the promoters of the undertaking may pay or tender to such mortgagee the principal and interest due on such mortgage, together with his costs and charges, if any, and also six months additional interest, and thereupon such mortgagee shall immediately convey his interest in the lands comprised in such mortgage to the promoters of the undertaking, or as they shall direct, or the promoters of the undertaking may give notice in writing to such mortgagee that they will pay off the principal and interest due on such mortgage at the end of six months, computed from the day of giving such notice; and if they shall have given any such notice, or if the party entitled to the equity of redemption of any such lands shall have given

Power to redeem mortgages,

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8 & 9 VICT. c. 18.
Sect. 109. six months notice of his intention to redeem the same, then at the expiration of either of such notices, or at any intermediate period, upon payment or tender by the promoters of the undertaking to the mortgagee of the principal money due on such mortgage, and the interest which would become due at the end of six months from the time of giving either of such notices, together with his costs and expenses, if any, such mortgagee shall convey or release his interest in the lands comprised in such mortgage to the promoters of the undertaking, or as they shall direct.

Deposit of
mortgage
money on re-
fusal to ac-
cept.

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CIX. If, in either of the cases aforesaid, upon such payment or tender, any mortgagee shall fail to convey or release his interest in such mortgage as directed by the promoters of the undertaking, or if he fail to adduce a good title thereto to their satisfaction, then it shall be lawful for the promoters of the undertaking to deposit in the bank, in the manner provided by this act in like cases, the principal and interest together with the costs, if any, due on such mortgage, and also if such payment be made before the expiration of six months notice as aforesaid, such further interest as would at that time become due; and it shall be lawful for them, if they think fit, to execute a deed-poll, duly stamped, in the manner hereinbefore provided in the case of the purchase of lands by them; and thereupon as well as upon such conveyance by the mortgagee, if any such be made, all the estate and interest of such mortgagee, and of all persons in trust for him or for whom he may be a trustee, in such lands, shall vest in the promoters of the undertaking, and they shall be entitled to immediate possession thereof in case such mortgagee were himself entitled to such possession.

Sum to be
paid when
mortgage ex-
ceeds the
value of the
lands.

CX. If any such mortgaged lands shall be of less value than the principal, interest and costs secured thereon, the value of such lands, or the compensation to be made by the promoters of the undertaking in respect thereof, shall be settled by agreement between the mortgagee of such lands and the party entitled to the equity of redemption thereof on the one part, and the promoters of the undertaking on the other part; and if the parties aforesaid fail to agree respecting the amount of such value or compensation, the same shall be determined as in other cases of disputed compensation; and the amount of such value or compensation, being

so agreed upon or determined, shall be paid by the promoters of the undertaking to the mortgagee in satisfaction of his mortgage debt, so far as the same will extend, and upon payment or tender thereof the mortgagee shall convey or release all his interest in such mortgaged lands to the promoters of the undertaking, or as they shall direct.

8 & 9 VICT.
c. 12.
SECT. 111.

CXI. If, upon such payment or tender as aforesaid being made, any such mortgagee fail so to convey his interest in such mortgage, or to adduce a good title thereto to the satisfaction of the promoters of the undertaking, it shall be lawful for them to deposit the amount of such value or compensation in the bank, in the manner provided by this act in like cases, and every such payment or deposit shall be accepted by the mortgagee in satisfaction of his mortgage debt, so far as the same will extend, and shall be a full discharge of such mortgaged lands from all money due thereon; and it shall be lawful for the promoters of the undertaking, if they think fit, to execute a deed-poll, duly stamped, in the manner hereinbefore provided in the case of the purchase of lands by them; and thereupon such lands, as to all such estate and interest as were then vested in the mortgagee, or any person in trust for him, shall become absolutely vested in the promoters of the undertaking, and they shall be entitled to immediate possession thereof in case such mortgagee were himself entitled to such possession; nevertheless, all rights and remedies possessed by the mortgagee against the mortgagor, by virtue of any bond or covenant or other obligation other than the right to such land, shall remain in force in respect of so much of the mortgage debt as shall not have been satisfied by such payment or deposit.

Deposit of
money when
refused on
tender.

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CXII. If a part only of any such mortgaged lands be required for the purpose of the special act, and if the part so required be of less value than the principal money, interest, and costs secured on such lands, and the mortgagee shall not consider the remaining part of such lands a sufficient security for the money charged thereon, or be not willing to release the part so required, then the value of such part, and also the compensation (if any) to be paid in respect of the severance thereof or otherwise, shall be settled by agreement between the mortgagee and the party entitled to the equity of redemption of such land on the one part, and the promo-

Sum to be
paid where
part only of
mortgaged
lands taken.

8 & 9 VICT.
c. 18.

Sect. 113.

ters of the undertaking on the other; and if the parties aforesaid fail to agree respecting the amount of such value or compensation, the same shall be determined as in other cases of disputed compensation; and the amount of such value or compensation, being so agreed upon or determined, shall be paid by the promoters of the undertaking to such mortgagee in satisfaction of his mortgage debt, so far as the same will extend; and thereupon such mortgagee shall convey or release to them, or as they shall direct, all his interests in such mortgaged lands, the value whereof shall have been so paid; and a memorandum of what shall have been so paid shall be endorsed on the deed creating such mortgage, and shall be signed by the mortgagee; and a copy of such memorandum shall at the same time (if required) be furnished by the promoters of the undertaking, at their expense, to the party entitled to the equity of redemption of the lands comprised in such mortgage deed.

Deposit of
money when
refused on
tender.

CXIII. If, upon payment or tender to any such mortgagee of the amount of the value or compensation so agreed upon or determined, such mortgagee shall fail to convey or release to the promoters of the undertaking, or as they shall direct, his interest in the lands in respect of which such compensation shall so have been paid or tendered, or if he shall fail to adduce a good title thereto to the satisfaction of the promoters of the undertaking, it shall be lawful for the *promoters of the undertaking to pay the amount of such value or compensation into the bank, in the manner provided by this act in the case of monies required to be deposited in such bank, and such payment or deposit shall be accepted by such mortgagee in satisfaction of his mortgage debt, so far as the same will extend, and shall be a full discharge of the portion of the mortgaged lands so required from all money due thereon; and it shall be lawful for the promoters of the undertaking if they think fit, to execute a deed-poll, duly stamped, in the manner hereinbefore provided in the case of the purchase of lands by them; and thereupon such lands shall become absolutely vested in the promoters of the undertaking, as to all such estate and interest as were then vested in the mortgagee, or any person in trust for him, and in case such mortgagee were himself entitled to such possession they shall be entitled to immediate possession thereof; nev-

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ertheless, every such mortgagee shall have the same powers and remedies for recovering or compelling payment of the mortgage money, or the residue thereof (as the case may be) and the interest thereof respectively, upon and out of the residue of such mortgaged lands, or the portion thereof not required for the purposes of the special act, as he would otherwise have had or been entitled to for recovering or compelling payment thereof upon or out of the whole of the lands originally comprised in such mortgage.

8 & 9 VICT.

c 18.

Sect. 114.

CXIV. Provided always, that in any of the cases hereinbefore provided with respect to lands subject to mortgage, if in the mortgage deed a time shall have been limited for payment of the principal money thereby secured, and under the provisions hereinbefore contained the mortgagee shall have been required to accept payment of his mortgage money or of part thereof, at a time earlier than the time so limited, the promoters of the undertaking shall pay to such mortgagee, in addition to the sum which shall have been so paid off, all such costs and expenses as shall be incurred by such mortgagee in respect of or which shall be incidental to the re-investment of the sum so paid off, such costs in case of difference to be taxed, and payment thereof enforced in the manner herein provided with respect to the costs of conveyances; and if the rate of interest secured by such mortgage be higher than at the time of the same being so paid off can reasonably be expected to be obtained on re-investing *the same, regard being had to the then current rate of interest, such mortgagee shall be entitled to receive from the promoters of the undertaking, in addition to the principal and interest hereinbefore provided for, compensation in respect of the loss to be sustained by him by reason of his mortgage money being so permanently paid off, the amount of such compensation to be ascertained, in case of difference, as in other cases of disputed compensation; and until payment or tender of such compensation as aforesaid the promoters of the undertaking shall not be entitled, as against such mortgagee, to possession of the mortgaged lands under the provision hereinbefore contained (e).

Compensation to be made in certain cases if mortgage paid off before the stipulated time.

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(e) Some property was mortgaged to the plaintiffs, who were not bound to receive their money until a future day.

8 & 9 Vict.
c. 12.
Sect. 115.

A railway company, with knowledge, treated with the mortgagor alone, and not agreeing, paid into court, to the credit of the mortgagor, the amount of compensation, but made no provisions for the compensation to the mortgagees under this section. The company then took possession, and commenced pulling down the building. The court restrained the company from proceeding until the value of the mortgagee's interests had been ascertained and paid or secured. (*Banken v. East and West India Docks, &c. Railw. Co.*, 12 Beav. 238; 14 Jur. 7; 19 L. J. Chanc. 153.)

Rent-Charges.

And with respect to lands charged with any rent-service, rent-charge, or chief or other rent, or other payment or incumbrance not hereinbefore provided for, be it enacted as follows :

Release of
lands from
rent-charges.

CXV. If any difference shall arise between the promoters of the undertaking, and the party entitled to any such charge upon any lands required to be taken for the purpose of the special act, respecting the consideration to be paid for the release of such lands therefrom, or from the portion thereof affecting the lands required for the purpose of the special act, the same shall be determined as in other cases of disputed compensation.

Release of
part of lands
from charge.

CXVI. If part only of the lands charged with any such rent-service, rent charge, chief or other rent, payment, or incumbrance, be required to be taken for the purpose of the special act, the apportionment of any such charge may be settled by agreement between the party entitled to such charge and the owner of the lands on the one part, and the promoters of the undertaking on the other part, and if such apportionment be not so settled by agreement, the same shall be settled by two justices; but if the remaining part of the lands so jointly subject by sufficient security for such charge then, with consent of the owner of the lands so jointly subject, it shall be lawful for the party entitled to such charge to release therefrom the lands required, on condition or consideration of such other lands remaining exclusively subject to the whole thereof.

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CXVII. Upon payment or tender of the compensation so agreed upon or determined to the party entitled to any such charge as aforesaid, such party shall execute to the promoters of the undertaking a release of such charge; and if he fail so to do, or if he fail to adduce good title to such charge, to the satisfaction of the promoters of the undertaking, it shall be lawful for them to deposit the amount of such compensation in the bank in the manner hereinbefore provided in like cases, and also if they think fit, to execute a deed-poll, duly stamped, in the manner hereinbefore provided in the case of the purchase of lands by them, and thereupon the rent-service, rent-charge, chief or other rent, payment or incumbrance or the portion thereof in respect whereof such compensation shall so have been paid shall cease, and be extinguished.

8 & 9 VICT.
c. 117.

Sect. 117.
Deposit in
case of re-
fusal to
release.

CXVIII. If any such lands be so released from any such charge or incumbrance, or portion thereof, to which they were subject jointly with other lands, such last mentioned lands shall alone be charged with the whole of such charge, or with the remainder thereof, as the case may be, and the party entitled to the charge shall have all the same rights and remedies over such last mentioned lands, for the whole or for the remainder of the charge, as the case may be, as he had previously over the whole of the lands subject to such charge; and if upon any such charge, or portion of charge, being so released, the deed or instrument creating or transferring such charge be tendered to the promoters of the undertaking for the purpose, they or two of them shall subscribe, or if they be a corporation shall affix their common seal to a memorandum of such release endorsed on such deed or instrument, declaring what part of the lands originally subject to such charge shall have been purchased by virtue of the special act, and if the lands be released from part of such charge, what portion of such charge shall have been released, and how much thereof continues payable, or if the lands so required shall have been released from the whole of such charge, then that the remaining lands are thenceforward to remain exclusively *charged therewith: and such memorandum shall be made and executed at the expense of the promoters of the undertaking, and shall be evidence in all courts and elsewhere of the facts therein stated, but not so as to exclude any other evidence of the same facts.

Charge to
continue on
lands not
taken.

[*360]

8 & 9 VICT.
c 18

Leases.

Sect. 119.

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And with respect to lands subject to leases, be it enacted as follows :

Where part only of lands under lease taken, the rent to be apportioned.

CXIX. If any lands shall be comprised in a lease for a term of years unexpired, part only of which lands shall be required for the purpose of the special act, the rent payable in respect of the lands comprised in such lease shall be apportioned between the lands so required, and the residue of such lands ; and such apportionment may be settled by agreement between the lessor and lessee of such lands on the one part, and the promoters of the undertaking on the other part, and if such apportionment be not so settled by agreement between the parties, such apportionment shall be settled by two justices ; and after such apportionment the lessee of such lands shall, as to all future accruing rent, be liable only to so much of the rent as shall be so apportioned in respect of the lands not required for the purpose of the special act ; and as to the lands not so required, and as against the lessee, the lessor shall have all the same rights and remedies for the recovery of such portion of the rent as previously to such apportionment he had for the recovery of the whole rent reserved by such lease ; and all the covenants, conditions and agreements of such lease, except as to the amount of rent to be paid, shall remain in force with regard to that part of the land which shall not be required for the purpose of the special act, in the same manner as they would have done in case such part only of the land had been included in the lease (*f*)

Power to complete inquisition.

(*f*) The Bristol and Exeter Railway Act (6 & 7 Will. 4, c. xxxvi. s. 47) provided that the company on payment of such sum as *should have been* awarded by the jury to the owner (or in case of his neglect or refusal to convey, into the Bank of England), might enter upon and take the lands. That act expired May 9th, 1838 : but by the 1 Vict. c. xxvi. s. 1, which came into operation June 12th, all its powers and authorities were revived. Sect. 2 repealed the 47th sect. Section 12 *revived* the time for taking lands, and extended it to three years from the expiration of the two limited by the former act ; and sect. 14 re-enacted sect. 46 in terms. An in-

quisition was taken under the 6 & 7 Will. 4, and an order made *June 11th for the payment of the purchase money into the bank; and on June the 21st (C. H. P. not having offered to convey), the money was paid in accordingly. It was held that the 1 Vict. c. xxvi. enabled the company to act upon and to complete the proceedings of the inquisition taken under the 6 & 7 Will. 4, c. xxxvi. (*Doe d. Paine v. Bristol and Exeter Railw. Co.*, 2 Railw. C. 75; 6 Mee. & W. 329.)

8 & 9 VICT.
c. 18.
Sect. 120.
[*361]

CXX. Every such lessee as last aforesaid, shall be entitled to receive from the promoters of the undertaking, compensation for the damage done to him in his tenancy by reason of the severance of the land required from those not required, or otherwise by reason of the execution of the works.

Tenants to
be compensated.

CXXI. If any such lands shall be in the possession of any person having no greater interest therein than as tenant for a year, or from year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain, or if a part only of such lands be required, compensation for the damage done to him in his tenancy by severing the lands held by him, or otherwise injuriously affecting the same: and the amount of such compensation, shall be determined by two justices, in case the parties differ about the same; and upon payment or tender of the amount of such compensation, all such persons shall respectively deliver up to the promoters of the undertaking, or to the person appointed by them to take possession thereof, any such lands in their possession required for the purpose of the special act (g).

Compensation to be made to tenants at will &c.

(g) The Hungerford Market Act embraced all tenants for years, from year to year, or at will, and directed compensation to be given for any "loss damage, or injury in respect of any interest whatsoever, for goodwill, improvements, tenants' fixtures, or otherwise." In addition to the cases already stated, *ante*, pp. 248—250, it will be proper to add that a tenant whose term had expired was held to be entitled to

Compensation for good will.

8 & 9 VICT.
c. 18.

Sect. 121.

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compensation for goodwill, and for the chance of obtaining a renewal under the Hungerford Market Act. (*Ex parte Gosling, Rex v. Hungerford Market Co.*, 1 Nev. & M. 548; 4 B. & Adol. 596). But not for fixtures set up or purchased, or for improvements made by him, inasmuch as he had no legal interest in them. It was held, nevertheless, that these might be considered by the jury in estimating the chance of a beneficial renewal. (*Id.*) So a person whose *legal tenancy had been determined by notice to quit was held to be entitled to compensation for goodwill. (*Ex parte Still, Rex v. Hungerford Market Co.*, 1 Nev. & M. 404; 4 B. & Adol. 592.) A lessee, whose term expired on the day the company came into possession (June 24th, 1830), obtained leave to hold on till the premises were wanted, and did so for a year and three-quarters, at the end of which time he quitted, having received half a year's notice. His under-tenant, who came in at Christmas, 1828, and held from year to year, and who knew of the above proceedings, and also received notice to quit, was held entitled to compensation for goodwill (to be assessed by a jury), under the 19th section of the act, which expressly mentions goodwill. (*Id.*) The goodwill of a business is a species of interest not easily defined, although to a certain extent it is recognised by courts of justice at least to the extent of enforcing contracts in relation to it. Lord Eldon, C., said "The goodwill, which has been the subject of sale, is nothing more than the probability that the old customers will resort to the old place." (*Cruttwell v. Lye*, 17 Ves. 346. See *Pilling v. Armitage*, 12 Ves. 87.) In another case it was said, "the goodwill of the business (which was that of an upholsterer) is nothing more than an advantage attached to the possession of the house; and the mortgagee, being entitled to the possession of the house, is entitled to the whole of that advantage." The court would not separate the goodwill from the house, but decided that the equitable mortgage of the house was entitled to the whole of the purchase money, whether arising from the value of the goodwill or from the value of the lease independently of the goodwill. (*Chisum v. Dewes*, 5 Russ. 29. See articles on

the legal incidents of goodwill, 7 Jur. 358—360, 366—368.)

8 & 9 VICT.

c. 18

Sect. 122.

In a case, said to come within the Hungerford Market Act, where the company had brought an ejectment against tenants, the court refused to stay proceedings till compensation should be made or a jury summoned, for if the making compensation was a condition precedent to determining the possession, it might form an answer to the action of ejectment, but furnished no ground for the interference of the court. (*Ex parte Furlow, in re Hungerford Market Co.*, 2 B. & Ad. 341.)

CXXII. If any party having a greater interest than as tenant at will, claim compensation in respect of any unexpired term or interest under any lease or grant of any such lands, the promoters of the undertaking may require such party to produce the lease or grant in respect of which such claim shall be made, or the best evidence in his power; and if, after demand, made in writing by the promoters of the undertaking, such lease or grant, or such best evidence thereof, be not produced within twenty-one days, the party so claiming compensation shall be considered as a tenant holding *only from year to year, and be entitled to compensation accordingly.

Where-
greater inter-
est claimed
than from
year to year,
lease to be
produced. —

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CXXIII. That the powers of the promoters of the undertaking for the compulsory purchase or taking of lands for the purposes of the special act, shall not be exercised after the expiration of the prescribed period, and if no period be prescribed, not after the expiration of three years from the passing of the special act. (1) (h)

Limit of time
for compulso-
ry purchase.

(1) A Railroad Company have no right to take lands, unless by the consent of the owner, after the time prescribed for the completion of their Road has expired. (*Peavy v. Calais Railroad Co.*, 30 Maine, 17 Shep. 498.)

(h) This section does not apply against a landowner, who having within the three years received a notice that his land is required by the promoters of the undertaking, and having within the three years regularly served them with a notice that he requires the amount of compensation to which he is

Effect of pro-
ceedings
commenced
but not com-
pleted, before
expiration of
powers.

8 & 9 Vict.

c. 18.

Sect. 123.

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entitled to be determined by a jury, and wishing to complete the sale of his land, applies for a mandamus to compel the company to issue a warrant for summoning a jury. The court was of opinion, that the powers which the purchaser wishes to be exercised are "powers of the promoters of the undertaking for the compulsory purchase or taking of lands." The powers to be thus exercised are powers to enable a willing vendor to transfer the full right and title of his lands to the company, on ascertaining and receiving the compensation to which he is entitled. (*Reg. v. Birmingham and Oxford Junction Railw. Co.*, 628; 14 Jur. 899; 19 Law J. Q. B. 453; 15 Q. B. 635; affirmed by Exch. Ch. *Ib.* 647, n.; 14 Jur. 899.)

A notice given by a railway company to a landowner, requiring his land for the purpose of the undertaking, is an exercise of the powers for compulsory purchase of land within the meaning of this section, and if such notice be given within the prescribed period, the steps necessary to acquire possession of the land may be taken afterwards. The entry on land, under the 85th section, is not the exercise of a power for compulsory purchase, but it is the exercise of a power for carrying that purchase into effect. (*Marquis of Salisbury v. Great Northern Railw. Co.*, 21 Law J. Q. B. 185; 7 Railw. C. 175.)

A railway company having given notice of their intention to purchase lands for the undertaking, deposited the purchase money and delivered the bond according to the 85th section of this act, before the expiration of the period prescribed for the exercise of their compulsory powers: neither their power to purchase the land, nor their power to enter, is gone by the subsequent expiration of the period. The powers for the compulsory purchase and taking of lands referred to in this section are powers given to the several promoters of the several special acts in which this act may be incorporated, and not several powers given to the promoters of each special act. This section refers to the powers given by the act for the purchase and taking of land, but not to the powers by this act given for carrying into effect a purchase

already made. (*Sparrow v. Oxford, &c. Railw. Co.*, 8 & 9 VICT. c. 18.
 9 Hare 436; *7 Railw. C. 92. See *Doe d. Armistead v. North Staffordshire Railw. Co.*, 16 Q. B. 526, *ante*, p. 339.)
 Sect 123.
 [*364]

The time within which a railway company was authorized to take lands expired on the 4th August, 1848. Long before this period they gave notice to a landowner to treat, and afterwards delivered to the plaintiff, to whom the lands had been in the meantime devised, a bond, and paid the estimated value of the lands comprised in the notice into the bank under the 80th section of this act. Under an amendment act, the powers of which extended beyond 1848, the company were authorised to take the land included in the notice; and, on August 3d, 1848, they gave a notice to the plaintiff that, in pursuance of the powers of both those acts, they intended to take the lands. After the 4th August, 1848, but without taking any further steps under the acts, the company entered on the land. On motion for an injunction, the court declined to interfere, on the ground that, although the company might not be then entitled to take possession under their compulsory powers, they were able, by some proceeding under the second act, to obtain the land; and the motion was ordered to stand over, with liberty to the plaintiff to bring an action. (*Williams v. South Wales Railw. Co.*, 3 De G. & S. 354; 13 Jur. 443.)

By the Whitehaven Railway Act it was provided, "that the powers of the company for the compulsory purchase or taking of lands, should not be exercised after the expiration of three years from the passing of the act." This period expired on the 4th July; the company having on the 17th May given the plaintiff notice that they would take a portion of his land, under the compulsory powers. On the 19th June a precept was issued to the sheriff to summon a jury to assess the value of the land, and the jury assembled on the 3d July, but did not terminate their sittings or make their award till the 6th July. Upon an application that the company might be restrained from paying the money in the manner directed by the act, and from proceeding to take possession

Injunction
 under this
 section.

8 & 9 VICT.
c. 18.
Sect. 123.

of the land, the court granted an injunction until the opinion of a court of law could be obtained, whether the compulsory power had or had not determined. (*Brocklebank v. Whitehaven Junction Railw. Co.*, 11 Jur. 663; 16 Law J. Chanc. 471; 5 Railw. C. 373.) Lord *Cottenham*, C., and other judges, have entertained serious doubts whether *Shadwell*, V. C., had come to a right conclusion in his opinion that the compulsory powers of the company to take lands had expired (*Ib.* p. 379; see 15 Q. B. 647; 16 Q. B. 537.)

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On an application for an injunction to restrain a railway company from taking proceedings to summon a jury under the compulsory clauses of this act, the court thought that the plaintiff would have been entitled to an injunction, but for the circumstance that the time limited for the exercise of the compulsory powers was on the point of expiring; but that the doubt as to the validity of such proceedings after that period, although the usual notice had been given of the intention of the company to take the land, was sufficient *ground for declining to grant the injunction, on the company undertaking not to act on the result of the jury proceedings without the leave of the court, and bringing into court 200*l.* to answer the plaintiff's costs and charges by reason of the process, without prejudice to any question. (*Wood v. North Staffordshire Railw. Co.*, 3 De G. & S. 368.)

Where a railway company are entitled to retain the possession of lands which they have taken, they must also be entitled, under their compulsory powers, to perfect their title. (*Sparrow v. Oxford, &c. Railw. Co.*, 9 Hare, 446; 7 Railw. C. 92.)

By an act of parliament, with which this act was incorporated, the powers of taking land compulsorily were not to be exercised after the expiration of three years from the passing of the act. The company gave notice to a landowner of their intention to take part of his land, but took no other step until three days before the expiration of their compulsory powers, when they delivered a bond and proceeded to take possession, under the 85th section of this act. *Shadwell*, V. C.

on the application of the landowner, granted an injunction to restrain the company from proceeding further with the purchase, and directed a case for the opinion of the Court of Exchequer, whether the company were then authorized to issue the warrant for determining the amount of purchase money to be paid, as a grave question arose whether, inasmuch as the company had allowed the three years to pass before they had taken the final step for determining what ought to be paid, the whole thing was not then virtually at an end. (*Kinnersly v. North Staffordshire Railw. Co.*, 6 Railw. C. 662.)

8 & 9 Vict.
c. 18.
Sect. 123.

A mandamus, tested the 22d April, 1850, commanded a railway company immediately to purchase lands necessary for making, constructing and completing a branch railway, and to make, construct, and complete the same, in pursuance of the provisions, powers and authorities contained in the recited acts of parliament. The special act, 9 & 10 Vict. c. cclxii. which received the royal assent on the 27th July, 1846, enacted by sect. 18 that the powers of the company for the compulsory purchase of lands for the purposes of that act should not be exercised after the expiration of three years; and by sect. 20, that the works thereby authorized should be completed within five years, and on the expiration of such period the powers granted to the company for executing the same should cease to be exercised, except as to so much of the same as should then be completed. It was held, first, that the court ought not to have issued the writ, the power of the company for the compulsory purchase of lands having expired before it was applied for. (*Reg. v. London and North Western Railw. Co.*, 15 Jur. 873; 20 L. J. Q. B. 399; 6 Railw. C. 634.) Secondly, that the return was good, without showing an application to all the landowners, and a refusal by them. (*Ib.*) It was questioned in this case, and has been the subject of a difference of judicial opinion, whether there lay upon the company an obligation to make and complete the railway, which might have been enforced by mandamus; *and whether want of funds for the purpose would be an answer? (*Ib.* See *Reg. v. Lancashire and Yorkshire Railw. Co.*, 22 Law J. Q. B. 57; *Reg. v. Great*

Mandamus
not to be
granted after
expiration of
powers.

[*366]

8 & 9 VICT.
c. 18

Sect. 123.

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Mandamus
to make line
on applica-
tion of land-
owners.

Western Railw. Co., 22 Law J. Q. B. 65; *Reg. v. York and North Midland Railw. Co.*, 1 Q. B. N. S. 178. See note on mandamus, *post*.

A railway act, which received the royal assent on the 18th June, 1846, enacted that the powers of the company for the compulsory purchase of lands for the purposes of the act should not be exercised after the expiration of three years, extended by a subsequent act to five years, and that the railways authorised by the act should be completed within five years, and on the expiration of such period the powers granted to the company for executing the same should cease to be exercised, except as to so much of such railways as should then be completed. Shortly after the passing of the act a portion of one of the branch lines had been set out, and the remainder in October, 1848, but no notice had been given to any landowner that his land would be required. At a meeting of the shareholders it had been resolved that the directors should not commence the making of any branch line without the consent of a general meeting of the company. An application to the company to make the branch line in question was made in March last, and a rule for a mandamus to the company to make and complete it was obtained in Easter Term. It was held, that the landowners had not been guilty of laches in making the application, and that the company had not shown a want of power to obey the writ; and therefore the court made the rule absolute. (*Reg. v. York, Newcastle and Berwick Railw. Co.*, and *Reg. v. Lancashire and Yorkshire Railw. Co.*, 15 Jur. Q. B. 904; 6 Railw. C. 648; 1 Q. B. N. S. 228.)

So ruled also, where, at a general meeting of the shareholders of the company, it had been resolved that the making of the branch line should be abandoned, and it was not shown by the affidavits on which the rule was obtained that the company had funds for completing the line. (*Ib.*)

Interests omitted to be purchased.

And with respect to interests in lands which have by mistake been omitted to be purchased, be it enacted as follows :

CXXIV. If at any time after the promoters of the undertaking shall have entered upon any lands, which under the provisions of this or the special act, or any act incorporated therewith, they were authorized to purchase, and which shall be permanently required for the purposes of the special act, any party shall appear to be entitled to any estate, right, or interest in, or charge affecting such lands, which the promoters of the undertaking shall, through mistake or inadvertance, have failed, or omitted duly to purchase or to pay *compensation for, then, whether the period allowed for the purchase of lands shall have expired or not, the promoters of the undertaking shall remain in the undisturbed possession of such lands, provided within six months after notice of such estate, right, interest or charge, in case the same shall not be disputed by the promoters of the undertaking, or in case the same shall be disputed, then within six months after the right thereto shall have been finally established by law in favor of the party claiming the same, the promoters of the undertaking shall purchase or pay compensation for the same, and shall also pay to such party, or to any other party who shall establish a right thereto, full compensation for the mesne profits or interest which would have accrued to such parties respectively in respect thereof, during the interval between the entry of the promoters of the undertaking thereon, and the time of the payment of such purchase money or compensation by the promoters of the undertaking, so far as such mesne profits or interest may be recoverable in law or equity; and such purchase money or compensation shall be agreed on or awarded, and paid in like manner as according to the provisions of this act, the same respectively would have been agreed on or awarded and paid in case the promoters of the undertaking had purchased such estate, right, interest or charge, before their entering upon such land, or as near thereto as circumstances will admit. (i)

8 & 9 VICT.
c. 18.

Sect 101.

Promoters of the undertaking empowered to purchase interest in lands the purchase whereof may have been omitted by mistake.

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(i) A corporation which was empowered, by special acts incorporated with this act, to take certain lands, required lands belonging to A. and B., the boundary between which was improperly described in their plans and books of reference. In the reference under the proceedings by arbitration to settle the value of B.'s land, the mistake of the boundary was

Mistaken purchase within this section.

8 & 9 VICT.
c. 18.
Sect. 125.

pointed out, but the award fixed a value in terms only for the land within the boundary so inaccurately delineated, leaving between it and the true boundary line a narrow strip of land belonging to B., but which the corporation had agreed to purchase from A. as part of his land, and for which they paid a sum of money to A., and of which they took possession as part of the land purchased from A. B. recovered the strip of land afterwards from the corporation in ejectment, and a rule for a new trial was refused. The corporation thereupon proceeded, within six months from such refusal, to make themselves legal owners of the strip of land in question under this section. B. filed a bill for an injunction to restrain them from so doing, which, upon motion, was refused with costs: it was held that the circumstances amounted to a mistake within this section, and that it applies to land altogether omitted to be purchased by mistake, "as well as to an outstanding interest therein so omitted to be purchased." (*Hyde v. Corporation of Manchester*, 16 Jur. 189; 5 De G. & S. 249.)

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After a railway company had purchased a piece of land from A., who was mentioned in the book of reference to be the owner of it, B., a neighbouring landowner, part of whose land the company had also taken, claimed to be owner of the piece of land, and filed a bill for an injunction to restrain the company from continuing in possession of it, and from committing waste on it. But the court refused the injunction. (*Webster v. South Eastern Railw. Co.*, 1 Sim. N. S. 272; 15 Jur. 73; 20 L. J. Chanc. 194; 6 Railw. C. 698.)

How value
of such lands
to be esti-
mated.

CXXV. In estimating the compensation to be given for any such last-mentioned lands, or any estate or interest in the same, or for any mesne profits thereof, the jury or arbitrators, or justices, as the case may be, shall assess the same according to what they shall find to have been the value of such lands, estate or interest, and profits, at the time such lands were entered upon by the promoters of the undertaking, and without regard to any improvements or works made in

the said lands by the promoters of the undertaking, and as though the works had not been constructed.

8 & 9 VICT.
c. 18.

CXXVI. In addition to the said purchase money, compensation, or satisfaction, and before the promoters of the undertaking shall become absolutely entitled to any such estate, interest, or charge, or to have the same merged or extinguished for their benefit, they shall, when the right to any such estate, interest, or charge shall have been disputed by the company, and determined in favor of the party claiming the same, pay the full costs and expenses of any proceedings at law or in equity for the determination or recovery of the same to the parties with whom any such litigation in respect thereof shall have taken place; and such costs and expenses shall, in case the same shall be disputed, be settled by the proper officer of the court in which such litigation took place.

Sect. 126
Promoters of
the under-
taking to pay
the costs of
litigation as
to such lands.

Sale of Superfluous Land.

And with respect to lands acquired by the promoters of the undertaking under the provisions of this or the special act, or any act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted as follows :

CXXVII. Within the prescribed period or if no period be prescribed within ten years after the expiration of the time limited by the special act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands, and apply the purchase money arising from such sales to the purposes of the special act; and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same.

Lands not
wanted to be
sold, or in
default to
vest in own-
ers of adjoin-
ing lands
[*369]

CXXVIII. Before the promoters of the undertaking dispose of any such superfluous lands they shall, unless such lands be situate within a town, or be lands built upon or used for building purposes, first offer to sell the same to the person then entitled to the lands (if any) from which the same were originally severed; or if such person refuse to purchase the same, or cannot after diligent inquiry be found, then the like offer shall be made to the person or to the several per-

Lands to be
offered to
owner of
lands from
which they
were origi-
nally taken
or to adjoin-
ing owners.

8 & 9 VICT.
c. 18.
Sect. 120.

sons whose lands shall immediately adjoin the lands so proposed to be sold, such persons being capable of entering into a contract for the purchase of such lands; and where more than one such person shall be entitled to such right of pre-emption such offer shall be made to such persons in succession, one after another, in such order as the promoters of the undertaking shall think fit.

Right of pre-emption to be claimed within six weeks.

CXXIX. If any such person be desirous of purchasing such lands, then within six weeks after such offer of sale they shall signify their desire in that behalf to the promoters of the undertaking, or if they decline such offer, or if for six weeks they neglect to signify their desire to purchase such lands, the right of pre-emption of every such person so declining or neglecting in respect of the lands included in such offer shall cease; and a declaration in writing made before a justice by some person not interested in the matter in question, stating that such offer was made and was refused or not accepted within six weeks from the time of making the same, or that the person or all the persons entitled to the right of pre-emption were out of the country, or could not after diligent inquiry be found, or were not capable of entering into a contract for the purchase of such lands, shall in all courts be sufficient evidence of the facts therein stated (*k*)

Sale of superfluous lands.

(*k*) A railway company, having under their act the usual power to sell surplus lands, with a direction to offer them in the first instance to the owners of the adjoining lands, entered into a contract for sale to a stranger, and then made an offer of the same lands to the parties who were entitled to *the right of pre-emption, which offer was declined. The purchaser refused to complete his contract, because the last-mentioned offer had not been made prior to the contract with him, and the company filed a bill to compel specific performance; it was held, that the objection was a question of conveyance, and not of title, and that the purchaser must complete the contract; but the court refused to give the plaintiffs the costs of the suit. (*London and Greenwich Railw. Co. v. Goodchild*, Law. J. 1844, Chanc. 224; 3 Railw. C. 507; 8 Jur. 455.

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Differences

CXXX. If any person entitled to such pre-emption be

desirous of purchasing any such lands, and such person and the promoters of the undertaking do not agree as to the price thereof, then such price shall be ascertained by arbitration, and the costs of such arbitration shall be in the discretion of the arbitrators.

8 & 9 Vict.
c. 18.

Sect. 131.
as to price
to be settled
by arbitra-
tion.

Lands to be
conveyed
to the pur-
chaser.

CXXXI. Upon payment or tender to the promoters of the undertaking of the purchase money so agreed upon or determined as aforesaid, they shall convey such lands to the purchasers thereof by deed under the common seal of the promoters of the undertaking, if they be a corporation, or if not a corporation under the hands and seals of the promoters of the undertaking or any two of the directors or managers thereof acting by the authority of the body; and a deed so executed shall be effectual to vest the lands comprised therein in the purchaser of such lands for the estate which shall so have been purchased by him; and a receipt under such common seal, or under the hands of two of the directors or managers of the undertaking as aforesaid, shall be a sufficient discharge to the purchaser of any such lands for the purchase money in such receipt expressed to be received.

CXXXII. In every conveyance of lands to be made by the promoters of the undertaking under this or the special act the word "grant" shall operate as express covenants by the promoters of the undertaking, for themselves and their successors, or for themselves, their heirs, executors, administrators, and assigns, as the case may be, with the respective grantees therein named, and the successors, heirs, executors, administrators, and assigns of such grantees, according to the quality or nature of such grants, and of the estate or interest therein expressed to be thereby conveyed, as follows, except so far as the same shall be restrained or limited by express words contained in any such conveyance; (that is to say,)

Effect of the
word "grant"
in convey-
ances.

A covenant that, notwithstanding any act or default *done by the promoters of the undertaking, they were at the time of the execution of such conveyance seised or possessed of the lands or premises thereby granted for an indefeasible estate of inheritance in fee simple, free from all incumbrances done or occasioned by them, or otherwise for such estate or interest as therein expressed

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8 & 9 VICT.
c. 18.

Sect. 133.

to be thereby granted free from incumbrance done or occasioned by them :

A covenant that the grantee of such lands, his heirs, successors, executors, administrators, and assigns (as the case may be,) shall quietly enjoy the same against the promoters of the undertaking, and their successors, and all other persons claiming under them, and be indemnified and saved harmless by the promoters of the undertaking and their successors from all incumbrances created by the promoters of the undertaking :

A covenant for further assurance of such lands, at the expense of such grantee, his heirs, successors, executors, administrators, or assigns (as the case may be), by the promoters of the undertaking, or their successors and all other persons claiming under them :

And all such grantees, and their several successors, heirs, executors, administrators, and assign respectively, according to their respective quality or nature, and the estate or interest in such conveyance expressed to be conveyed, may in all actions brought by them assigns breaches of covenants, as they might do if such covenants were expressly inserted in such conveyances.

Land tax and
poor's rate to
be made
good.

CXXXIII. That if the promoters of the undertaking become possessed by virtue of this or the special act or any act incorporated therewith, of any lands charged with the land tax, or liable to be assessed to the poor's rate, they shall from time to time, until the works shall be completed and assessed to such land tax or poor's rate, be liable to make good the deficiency in the several assessments for land tax and poor's rate by reason of such lands having been taken or used for the purposes of the works, and such deficiency shall be computed according to the rental at which such lands, with any building thereon, were valued or rated at the time of the passing of the special act ; and on demand of such deficiency the promoters of the undertaking, or their treasurer, shall pay all such deficiencies to the collector of the said assessments respectively ; nevertheless, if at any time the promoters of the undertaking *think fit to redeem such land tax, they may do so in accordance with the powers in that behalf given by the acts for the redemption of the land tax (l).

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(l) See *Reg. v. Bristol Dock Co.*, 2 Railw. C. 571.

8 & 9 Vict.
c. 18

CXXXIV. That any summons or notice, or any writ or other proceeding at law or in equity, requiring to be served upon the promoters of the undertaking, may be served by the same being left at or transmitted through the post directed to the principal office of the promoters of the undertaking, or one of the principal offices where there shall be more than one, or being given or transmitted through the post directed to the secretary, or in case there be no secretary, to the solicitor of the said promoters (m).

Sect. 134.

Service of
notices upon
company.

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(m) This section is applicable to all cases where a summons or notice is required for any purpose, and does not refer to proceedings in an action only. (*Re South Yorkshire, Doncaster, &c., Railw. Co.*, 18 Law J. Q. B. 333. See 8 & 9 Vict. c. 16, s. 135 *ante*, p. 210; 8 & 9 Vict. c. 20, s. 138, *post*.)

CXXXV. That if any party shall have committed any irregularity, trespass or other wrongful proceeding in the execution of this or the special act, or any act incorporated therewith, or by virtue of any power or authority thereby given, and if, before action brought in respect thereof, such party make tender of sufficient amends to the party injured, such last-mentioned party shall not recover in any such action; and if no such tender shall have been made it shall be lawful for the defendant, by leave of the court where such action shall be pending, at any time before issue joined, to pay into court such sum of money as he shall think fit, and thereupon such proceedings shall be had as in other cases where defendants are allowed to pay money into court (n).

Tender of
amends.

(n) A thing is to be considered as done in pursuance of the act, where the person who does it is acting honestly and *bona fide*, either under the powers which the act gives, or in discharge of the duties which it imposes. Though he may erroneously exceed the powers the act gives, or inadequately discharge the duties, yet, if he acts, *bona fide* in order to execute such powers, or to discharge such duties, he is to be considered as acting in pursuance of the act, and it is to be entitled to the protection conferred upon persons whilst so

8 & 9 VICT. acting. (*Smith v. Shaw*, 10 B. & C. 284; *Gaby v. Wilts*
 c. 18. *and Berks Canal Co.*, 3 M. & Selw. 580; *Theobald v.*
 Sect. 136. *Crichmore*, 1 B. & Ald. 227; *Parton v. Williams*, 3 B. &
 Ald. 330; *Cook v. Leonard*, 6 B. & C. 351.)

[373] *By a railway act, 5 & 6 Will. 4, c. 107, s. 223, it is pro-
 vided, that no action shall be brought against any person for
 anything done or omitted to be done in pursuance of the act,
 unless such action shall be commenced within six months
 next after the act committed, or in case there shall be a con-
 tinuation of the damage, then within six months next after
 the committing such damage shall have ceased. By a sub-
 sequent act the company are authorized to alter the course of
 a canal, provided, that if in the execution of the works the
 canal shall be obstructed, the railway company shall pay to
 the proprietors of the canal 10*l.* an hour as liquidated dam-
 ages during the continuance of the obstruction, and in de-
 fault of payment of such sum on demand, the proprietors
 may recover the same in an action of debt. The railway
 company in the execution of their works obstructed the can-
 al in 1840, and in June, 1841. In May, 1842, the proprie-
 tors of the canal made a demand on the railway company for
 the penalties for the two obstructions, the last of which they
 described in their demand as having ceased on the 11th June
 1841. In July, 1842, they brought an action for the said
 penalties; it was held, that the action was not brought in
 time, as the limitation of six months for bringing the action
 began to run from the ceasing of the obstruction, and not
 from the demand and non-payment of the penalties. (*Ken-
 net and Avon Canal v. Great Western Railw. Co.*, 7 Q.
 B. 824; 4 Railw. C. 90.)

Recovery of Penalties.

And with respect to the recovery of forfeitures, penalties
 and costs, be it enacted as follows:

Penalties to
 be summari-
 ly recovered
 before two
 justices.

CXXXVI. Every penalty or forfeiture imposed by this
 or the special act, or by any by-law made in pursuance
 thereof, the recovery of which is not otherwise provided for,
 may be recovered by summary proceeding before two justices;

and on complaint being made to any justice he shall issue a summons requiring the party complained against to appear before two justices at a time and place to be named in such summons, and every such summons shall be served on the party offending, either in person or by leaving the same with some inmate at his usual place of abode; and upon the appearance of the party complained against, or in his absence, after proof of the due service of such summons, it shall be lawful for any two justices to proceed to the hearing of the complaint, and that although no information in writing or in print shall have been exhibited before them; and upon proof of the offence, either by the confession of the party complained against, or upon the oath of one credible witness or more, it shall be lawful for such justices to convict the offender, and upon such conviction to adjudge the offender to pay the penalty or forfeiture incurred, as *well as such costs attending the conviction as such justices shall think fit (o). 8 & 9 Vict.
c. 18.
Sect. 137.

(o) A railway act imposed a penalty on the company for the interruption of any road, and, in the case of a private road made the penalty "payable to the owner thereof:" it was held, that the tenant of the farm over which the road passed could not sue for the penalty. The same act enacted, that any penalty imposed thereby, the recovery of which was not otherwise provided for, might be recovered by summary proceeding, upon complaint before two or more justices: it was held that this did not bar the party entitled from his remedy by action at law. (*Collinson v. Newcastle and Darlington Railw. Co.*, 1 Carr & K. 456. See 8 & 9 Vict. c. 16, s. 147; 8 & 9 Vict. c. 20, s. 145. See *Chilton v. London and Croydon Railw. Co.*, 16 Mee. & W. 212; 5 Railw. Ca. 1; ante p. 207.) Recovery of
penalty.

CXXXVII. If forthwith upon any such adjudication as aforesaid, the amount of the penalty or forfeiture, and of such costs as aforesaid, be not paid, the amount of such penalty and costs shall be levied by distress; and such justices, or either of them, shall issue their or his warrant of distress accordingly (p). Penalties to
be levied by
distress,

(p) See 8 & 9 Vict. c. 16, s. 148; 8 & 9 Vict. c. 20 s. 146.

8 & 9 Vict.
c. 18.

Sect. 138.

Distress how
to be levied.

CXXXVIII. Where in this or the special act, or any act incorporated therewith, any sum of money, whether in the nature of penalty, costs or otherwise, is directed to be levied by distress, such sum of money shall be levied by distress and sale of the goods and chattels of the party liable to pay the same; and the overplus arising from the sale of such goods and chattels, after satisfying such sum of money and the expenses of the distress and sale, shall be returned, on demand, to the party whose goods shall have been distrained (q).

(q) See 8 & 9 Vict. c. 15, s. 150; 8 & 9 Vict. c. 20, s. 148.

Application
of penalties.

CXXXIX. The justices by whom any such penalty or forfeiture shall be imposed may, where the application thereof is not otherwise provided for, award not more than one half thereof to the informer, and shall award the remainder to the overseers of the poor of the parish in which the offence shall have been committed, to be applied in aid of the poor's rate of such parish; or if the place wherein the offence shall have been committed shall be extra-parochial, then such justices shall direct such remainder to be applied in aid of the poor's rate of such extra-parochial place, or if there shall not be any poor's rate therein, in aid of the poor's rate of any adjoining parish or district (r).

(r) See 8 & 9 Vict. c. 16, s. 152; 8 & 9 Vict. c. 20, s. 140.

Distress
against treas-
urer

[*175]

*CXL. If any such sum shall be payable by the promoters of the undertaking, and if sufficient goods of the said promoters cannot be found whereon to levy the same, it may, if the amount thereof do not exceed twenty pounds, be recovered by distress of the goods of the treasurer of the said promoters, and the justices aforesaid, or either of them, on application, shall issue their or his warrant accordingly; but no such distress shall issue against the goods of such treasurer unless seven days previous notice in writing, stating the amount so due, and demanding payment thereof, have been given to such treasurer or left at his residence: and if such treasurer pay any money under such distress as aforesaid, he may retain the amount so paid by him, and all costs and expenses occasioned thereby, out of any money belonging to

the promoters of the undertaking coming into his custody or control, or he may sue them for the same (s).

8 & 9 VICT.
c. 18.
Sect. 141.

(s) See 8 & 9 Vict. c. 16, s. 143.

CXLI. No distress levied by virtue of this or the special act, or any act incorporated therewith, shall be deemed unlawful, nor shall any party making the same be deemed a trespasser, on account of any defect or want of form in the summons, conviction, warrant of distress, or other proceeding relating thereto, nor shall such party be deemed a trespasser *ab initio* on account of any irregularity afterwards committed by him, but all persons aggrieved by such defect or irregularity may recover full satisfaction for the special damage in an action upon the case (t).

Distresses
not unlawful
for want of
form.

(t) See 8 & 9 Vict. c. 16, s. 151; 8 & 9 Vict. c. 20, s. 149.

CXLII. No person shall be liable to the payment of any penalty or forfeiture imposed by virtue of this or the special act, or any act incorporated therewith, for any offence made cognizable before a justice, unless the complaint respecting such offence shall have been made before such justice within six months next after the commission of such offence (u).

Penalties to
be sued for
within six
months.

(u) See 8 & 9 Vict. c. 16, s. 153; 8 & 9 Vict. c. 20, s. 151.

CXLIII. It shall be lawful for any justice to summon any person to appear before him as a witness in any matter in which such justice shall have jurisdiction under the provisions of this or the special act at a time *and place mentioned in such summons, and to administer to him an oath to testify the truth in such matter; and if any person so summoned shall without reasonable excuse, refuse or neglect to appear at the time and place appointed for that purpose, having been paid or tendered a reasonable sum for his expenses, or if any person appearing shall refuse to be examined upon oath or to give evidence before such justice, every such person shall forfeit a sum not exceeding five pounds for every such offence (v).

Penalty on
witnesses
making de-
fault.

[*376]

(v) See 8 & 9 Vict. c. 16, s. 155; 8 & 9 Vict. c. 20, s. 153.

CXLIV. The justices before whom any person shall be

Form of con-
viction,

8 & 9 Vict. c. 18. convicted of any offence against this or the special act, or any act incorporated therewith, may cause the conviction to be drawn up according to the form in the schedule (C.) to this act annexed (x).
Sect. 145.

(x) The form of conviction is the same as in schedule (G.) 8 & 9 Vict. c. 16; see Appendix.

Proceedings not to be quashed for want of form. CXLV. No proceeding in pursuance of this or the special act, or any act incorporated therewith, shall be quashed or vacated for want of form, nor shall the same be removed by certiorari or otherwise into any of the superior courts (y).

When certiorari will lie. (y) See 8 & 9 Vict. c. 16, s. 158; 8 & 9 Vict. c. 20, s. 156. A certiorari will lie to remove the proceedings where there has been an excess of jurisdiction (*South Wales Railw. Co. v. Richards*, 6 Railw. C. 197); but not where the proceedings are within the jurisdiction. *Reg. v. Lancaster and Preston Railw. Co.*, 6 Q. B. 759; 3 Railw. C. 725.)

Where it appeared that the line of a railway when made would sever, by crossing at a level, what was called an occupation-road, by which the claimant was accustomed to pass, within his own lands, from his farm house to the highway, and it further appeared, from the terms of a written verdict set out in the affidavit, that a jury, assembled under the provisions of this act, had given, contrary to the direction of the sheriff, not merely the price of the purchased land, and a compensation for the injury caused by such severance to the claimant's lands unpurchased, which injury, being an accessory to the taking of the lands purchased, was properly a matter for the consideration of the jury; but, besides, and in a gross sum, what they considered sufficient to enable the claimant to provide a proper mode for the communication between the two parts of his estate: it was held, that it sufficiently appeared that the jury had exceeded their jurisdiction in that particular, and that the superior court would therefore issue a *certiorari* to remove the inquisition for the purpose of quashing it. In *re Richards v. South Wales*

Railw. Co., 13 Jur. 1095; 18 L. J. Q. B. 310; 6 Railw. C. 197, it was held, that when the sheriff and jury inquired into a matter which partly exceeded the jurisdiction given to them by this act, and the 8 & 9 Vict. c. 20, they could not be considered as proceeding under those statutes; *and that therefore the *certiorari* was not prohibited by this section, which applies only to proceedings within the statutes. (*Ib.*) And that, in order to oust the superior court by this section of its inherent jurisdiction over all inferior courts, it is not necessary that the excess of jurisdiction in the inferior court should appear in every part of its proceeding, because the court cannot give validity to one of its acts, beyond its power, by doing at the same time other acts which it is competent to do. (*Ib.* See *post*, note on *Certiorari*.)

8 & 9 Vict.
c. 18.
Sect. 146.

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CXLVI. If any party shall feel aggrieved by any determination or adjudication of any justice, with respect to any penalty or forfeiture under the provisions of this or the special act or any act incorporated therewith, such party may appeal to the general quarter sessions for the county or place in which the cause of appeal shall have arisen; but no such appeal shall be entertained unless it be made within four months next after the making of such determination or adjudication, nor unless ten days notice in writing of such appeal, stating the nature and grounds thereof, be given to the party against whom the appeal shall be brought, nor unless the appellant forthwith after such notice enter into recognizances, with two sufficient sureties, before a justice, conditioned duly to prosecute such appeal, and to abide the order of the court thereon (z).

Parties allowed to appeal to quarter sessions on giving security.

(z) See 8 & 9 Vict. c. 16, s. 159; 8 & 9 Vict. c. 20, s. 157.

CXLVII. At the quarter sessions for which such notice shall be given the court shall proceed to hear and determine the appeal in a summary way, or they may if they think fit, adjourn it to the following sessions; and upon the hearing of such appeal, the court may if they think fit, mitigate any penalty or forfeiture, or they may confirm or quash the adjudication, and order any money paid by the appellant, or levied by distress upon his goods, to be returned to him, and

Court to make such order as they think reasonable.

8 & 9 Vict.
c. 18.
Sect. 148,

may also order such further satisfaction to be made to the party injured as they may judge reasonable ; and they may make such order concerning the costs, both of the adjudication and of the appeal, as they may think reasonable (a).

(a) See 8 & 9 Vict. c. 16, s. 160 ; 8 & 9 Vict. c. 20, s. 158.

[*378]

Receiver of
the metropo-
litan police
district to
receive pe-
nalties in-
curred with-
in his district.

*CXLVIII. Provided always, and be it enacted, that notwithstanding any thing herein or in the special act, or any act incorporated therewith, contained, every penalty or forfeiture imposed by this or the special act or any act incorporated therewith, or by any by-law in pursuance thereof, in respect of any offence which shall take place within the metropolitan police district, shall be recovered, enforced, accounted for, and except where the application thereof is otherwise specially provided for, shall be paid to the receiver of the metropolitan police district, and shall be applied in the same manner as penalties or forfeitures, other than fines upon drunken persons, or upon constables for misconduct, or for assaults upon police constables, are directed to be recovered enforced, accounted for, paid, and applied by an act passed in the third year of the reign of her present majesty, entitled "An Act for regulating the Police Courts in the Metropolis," and every order or conviction of any of the police magistrates in respect of any such forfeiture or penalty, shall be subject to the like appeal and upon the same terms as is provided in respect of any order or conviction of any of the said police magistrates by the said last mentioned act ; and every magistrate by whom any order or conviction shall have been made shall have the same power of binding over the witnesses who shall have been examined, and such witnesses shall be entitled to the same allowance of expenses as he or they would have had or been entitled to in case the order, conviction, and appeal had been made in pursuance of the provisions of the said last-mentioned act (b).

2 & 3 Vict.
c. 71.

Recovery of
penalties and
forfeitures
within me-
tropolitan
police dis-
trict.

(b) The 8 & 9 Vict. c. 20, s. 159, is verbatim the same as this. By 2 & 3 Vict. c. 71, s. 45, penalties and forfeitures may be levied, with the costs of proceedings, by distress and sale of the goods of the person liable to pay the same, by warrant under the hand of any magistrate appointed or con-

tinued under that act, and the overplus (if any) shall be returned on demand to the party whose goods shall have been distrained; and in case any such penalty shall not be forthwith paid, such magistrate may order the party to be detained in safe custody until return can be conveniently made to such warrant, unless such party shall give security to the satisfaction of the magistrate for his appearance at such time and place, not being more than seven days from the time of such detention, as shall be appointed for the return of the warrant of distress, and the magistrate may take such security, by way of recognizance or otherwise, if, upon the return of such warrant, there shall be no sufficient distress whereon to levy the penalty, and the same shall *not be forthwith paid; or in case it shall appear to the magistrate upon the confession of the party, or otherwise, that he has not sufficient distress whereon to levy the penalty if a warrant of distress should be issued, the magistrate may, by warrant, commit the party to any prison within his jurisdiction, for any time not more than one calendar month where the sum to be paid shall not exceed 5*l.*, and not more than three months in any case, the imprisonment to cease on payment of the sum due.

8 & 9 Vict.
c. 18.
Sect. 148.

[*379]

The magistrate at each of the metropolitan police courts shall keep, in books, a full, true, and particular account of all fees received thereat, with all penalties and forfeitures which shall have been received in pursuance of any adjudication, conviction or order had or made thereat, or any process or warrant issuing therefrom, to which books of account the said receiver shall at all times have free access; and the said magistrate shall, once in every quarter of a year, cause to be delivered to the receiver, an account of all such sums received, with all proper vouchers for verifying the same, and shall cause the amount of all such sums to be paid to the receiver, to be applied by him towards the expenses of the said courts. (2 & 3 Vict. c. 71, s. 46.)

Accounts to be kept of fees and forfeitures received and delivered quarterly to the receiver and the amount thereof paid to him

Certain penalties and forfeitures recovered to be paid to the receiver.

That where, by any act or acts, any penalties or forfeitures, or shares thereof, shall be recoverable in a summary manner before any justice or justices of the peace, and made

8 & 9 VICT.
c. 18
Sect. 148.

payable to her majesty, or to any body corporate, or to any person or persons whomsoever, save the informer who shall sue for the same, or any party aggrieved, in every such case the same, if recovered or adjudged before any of the said magistrates, shall be recovered for and adjudged to be paid to the said receiver for the time being. (2 & 3 Vict. c. 71, s. 47.)

Forms of in-
formation
and convic-
tion.

The information and the conviction may be drawn up according to the forms to that act annexed (see Appendix *post*), or any other forms to the same effect, as the case may require; but that enactment shall not invalidate any information or conviction laid or drawn in any other form which may be more specially suited to the case or may be provided by law; and in any information and in every conviction it shall be sufficient to state the offence in the words of the statute declaring the offence or attaching any penalty thereunto, (2 & 3 Vict. c. 71, s. 48.)

Conviction
&c. not to
be quashed
for inform-
ality, &c.

No information, conviction or other proceeding before magistrates shall be void for want of form, or be removed by *certiorari* into the Queen's Bench. (2 & 3 Vict. c. 71, s. 49.)

Appeal to
quarter ses-
sions.

That in every case of summary order or conviction before any of the said magistrates, in which the sum or penalty adjudged to be paid shall be more than three pounds, or in which the penalty adjudged shall be imprisonment for any time more than one calendar month, any person thinking himself aggrieved may appeal to the next general or quarter sessions for the county wherein the cause of complaint shall have arisen, provided that such person at the time of the order or conviction, or within forty-eight hours thereafter, *shall enter into a recognizance, with two sufficient sureties, conditioned personally to appear at the said sessions to try such appeal, and to abide the judgment of the court, and to pay such costs as shall be awarded; and the magistrate by whom such order or conviction shall have been made may bind over the witnesses who shall have been examined, in sufficient recognizances, to attend and be examined at the hearing of such appeal; and that every such witness, on pro-

ducing a certificate of his being so bound under the hand of the magistrate, shall be allowed compensation for his time, trouble and expenses in attending the appeal, which compensation shall be paid, in the first instance by the treasurer of the county, in like manner as in case of misdemeanor, under the provisions of an act 7 Geo. 4, c. 64; and in case the appeal shall be dismissed, and the order of conviction confirmed, the reasonable expenses of all such witnesses attending as aforesaid, to be ascertained by the court, shall be repaid to the treasurer of the county by the appellant. (2 & 3 Vict. c. 71, s. 50.)

8 & 9 VICT.
c. 18.
Sect. 148.

[380]

Any distress under the magistrate's warrant shall not be deemed unlawful, nor shall any party making the same be deemed a trespasser, for want of form in the proceeding relating thereto, nor shall such party be deemed a trespasser *ab initio* on account of any irregularity which shall be afterwards committed by him, but all persons aggrieved by such defect or irregularity may recover full satisfaction for the special damage by action on the case. (2 & 3 Vict. c. 71, s. 51.)

Distress not
unlawful for
want of form

No plaintiff shall recover in any action for any irregularity, trespass or other wrongful proceeding made or committed in the execution of that act, if tender of sufficient amends shall have been made by or on behalf of the party who shall have committed such irregularity, trespass, or other wrongful proceeding, before such action brought; and in case of no tender, the defendant in any such action may, by leave of the court before issue joined, pay into court such sum of money as he shall think fit, whereupon such adjudication shall be made by such court as in other actions where defendants are allowed to pay money into court. (2 & 3 Vict. c. 71, s. 52.)

Plaintiff not
to recover
after tender
of amends.

No action or any other proceeding shall be commenced or prosecuted against any person for anything done or omitted to be done in pursuance of that act, unless twenty days previous notice in writing shall be given to the party intending

Limitation
of actions.

8 & 9 Vict.
c. 18.

Sect. 149.

to commence and prosecute such proceeding to the intended defendant, nor unless such proceeding shall be commenced within three calendar months next after the act committed, or in case there shall be a continuation of damage, then within three calendar months next after the doing such damage shall have ceased; the proceedings must be in the county of Middlesex; and if the plaintiff shall become nonsuited, or shall suffer a discontinuance of his suit, &c. after the defendant shall have appeared, or if a verdict shall pass against the plaintiff, or if upon demurrer or otherwise judgment shall be given against the plaintiff, the defendant shall [*381] *have his costs as between attorney and client, and shall have such remedy for recovering the same as defendants have for recovering costs of suits by law in other cases. (2 & 3 Vict. c. 71, s. 53.) The act last cited is not affected by 11 & 12 Vict. c. 43. (See s. 33.)

Table of Fees annexed to Stat. 2 & 3 Vict. c. 71.

	s.	d.
For every summons - - - - -	2	0
For every warrant (except warrants of distress) -	2	0
For backing a warrant - - - - -	1	0
For every recognizance to appear before a magistrate or to take trial - - - - -	2	6
For every recognizance to keep the peace or to be of good behavior - - - - -	2	6
For every supersedeas - - - - -	3	0
For every warrant of distress - - - - -	3	0

Persons giving false evidence liable to penalties of perjury.

CXLIX. That any person who upon any examination upon oath under the provisions of this or the special act, or any act incorporated therewith, shall willfully and corruptly give false evidence, shall be liable to the penalties of wilful and corrupt perjury.

Access to Special Act.

And with respect to the provisions to be made for affording

access to the special act by all parties interested, be it enacted as follows :

8 & 9 Vict.
c. 18.

Sect. 150.

CL. The company shall, at all times after the expiration of six months after the passing of the special act, keep in their principal office of business a copy of the special act, printed by the printers to her majesty, or some of them ; and where the undertaking shall be a railway, canal or like undertaking, the works of which shall not be confined to one town or place, shall also within the space of such six months deposit in the office of each of the clerks of the peace of the several counties into which the works shall extend a copy of such special act so printed as aforesaid ; and the said clerks of the peace shall receive, and they and the company respectively shall retain, the said copies of the special act, and shall permit all persons interested to inspect the same, and make extracts or copies therefrom, and in the like manner and upon the like terms and under the like penalty for default as is provided in the case of certain plans and sections, by an act passed in the first year of the reign of her present majesty, entitled " An Act to compel Clerks of the Peace for Counties and other Persons to take the Custody of such Documents as shall be directed to be deposited *with them under the Standing Orders of either House of Parliament (c).

Copies of special act to be kept and deposited and allowed to be inspected.

7 Will 4 &
1 Vict c. 83.

[*382]

(c) See 8 & 9 Vict. c. 16, s. 161, *ante*, p. 219, n. ; 8 & 9 Vict. c. 20, s. 162.

CLI. If the company shall fail to keep or deposit as herebefore mentioned any of the said copies of the special act, they shall forfeit twenty pounds for every such offence, and also five pounds for every day afterwards during which such copy shall be not so kept or deposited (d)

Penalty on company failing to keep or deposit.

(d) 8 & 9 Vict. c. 16, s. 162 ; 8 & 9 Vict. c. 20, s. 163.

CLII. And be it enacted, that this act shall not extend to Scotland (e).

Act not to extend to Scotland.

(e) 8 & 9 Vict. c. 16, s. 143 ; 8 & 9 Vict. c. 20, s. 164. The Lands Clauses Consolidation (Scotland) Act is 8 & 9 Vict. c. 19, and is entitled " An Act for consolidating in one

8 & 9 VICT.
c. 18.

Sect. 152.

Act certain Provisions usually inserted in Acts authorizing the taking of Lands for Undertakings of a Public Nature in Scotland." (8 May 1845)

[382] See Schedule to this act in the Appendix.

*THE RAILWAYS ACT, (IRELAND), 1851.

[*383]

14 & 15 VICTORIA, c. 70.

14 & 15 VICT.
c. 70.

An Act to alter and amend certain Provisions of the Lands Clauses Consolidation Act, 1845, so far as relates to Ireland.

Sect. 1.

[7th August, 1851.]

WHEREAS, on account of circumstances connected with the tenure of land in Ireland, the provisions of the Lands Clauses Consolidation Act, 1845, are found to be unsuited to the existing condition of that country, and it is expedient that some provision should be made for ascertaining the purchase money or compensation to be paid by railway companies in Ireland, for the lands required for their undertaking, and for determining differences with respect to the works to be made and maintained by such companies for the accomodation of the owners and ocupiers of lands adjoining such railways: Be it therefore enacted as follows:

I. In citing this act in other acts of parliament, legal instruments, proceedings at law or in equity, and all other instruments and proceedings whatsoever, it shall be sufficient to use the expression "The Railways Act (Ireland), 1851."

Short title.

II. This act shall apply to every railway in Ireland authorized to be made by any act passed in this session of parliament, or which shall hereafter be passed, and which shall authorize the purchase or taking of lands for such railway, and also to every railway or portion of a railway in Ireland by any act heretofore passed authorized to be made in relation to which the compulsory powers for taking lands are still in force, and this act shall be incorporated with and form part of the acts authorizing the said undertakings: provided always, that this act shall not apply to the railways authorized to be made by "The Waterford and Limerick Railway Amendment Act, 1850," "The Dublin and Drogheda Railway Act, 1850," "The Dundalk and Enniskillen Railway Act, 1850," and "The Midland Great Western Railway of Ireland (Deviation and

Act to apply to railway in Ireland authorized in this session, &c., and to those heretofore authorized, except 13 & 14 Vict. c. xxix. 13 & 14 Vict. c. xlv. 13 & 14 Vict. c. lxxvi. 13 & 14 Vict. c. lxxviii. 14 & 15 Vict. c. cx. 14 & 15 Vict. c. ciii.

14 & 15 VICT. Amendment) Act, 1850," "The Waterford and Limerick
 c. 70. Railway Deviation Act, 1851," and "The Killarney Junction
 Sect. 3. Railway Act, 1851," "The Longford Line and Liffey Branch,
 13 & 14 Vict.," or to which the provisions of such acts re-
 spectively are applicable, and shall not in anywise interfere
 with or affect the provisions of such acts.

Certain pro- III. The clauses of "The Lands Clauses Consolidation
 visions of 8 & Act, 1845," with respect to the purchase and taking of lands
 9 Vict. c. 18, otherwise than by agreement, except sections sixteen and
 not to apply seventeen of the said act, shall not be applicable or in force
 to this act. with respect to any railway or portion of a railway in Ireland
 to which this act applies (a).

(a) See ss. 18—68. *ante*, pp. 258—303.

Company to IV. When and so often as any company authorized to
 deliver maps, make a railway to which this act applies shall require to
 schedules, purchase or take any lands which they are by the special
 and estimates act authorized to purchase or take, the company shall cause
 at the office of to be made out and to be signed by their engineer and
 Commissioners secretary, maps or plans and schedules of the lands so requir-
 of Public ed (and for the purchase of which lands, or of all the sev-
 Works, and eral interests in which lands, the company shall not have
 deposit copies contracted), and also of the works which the company
 with clerks of propose to make and maintain for the accommoda-
 the peace and tion of lands adjoining the railway (and for compensa-
 clerks of tion in lieu of which the company shall not have
 unions. contracted), together with the names of the owners or reputed
 owners, lessees or reputed lessees, and occupiers of the said
 lands respectively so far as the same can be reasonably as-
 certained, with estimates of the gross annual value and the
 value in fee of such lands so required to be purchased or
 taken as aforesaid, and for the purchase of which, or of all the
 several interests in which the company shall not have contract-
 ed, and the separate and distinct value of each such interest
 which the company shall not have contracted to purchase, so
 far as the same can be reasonably ascertained (taking into
 consideration damage by severance, and any other matters
 by the Lands Clauses Consolidation Act, 1845, required to be
 considered, if necessary); and every such map or plan shall
 be upon a scale of not less than one inch to every two hun-
 dred feet; and all lands, buildings, yards and courtyards, and
 lands within the curtilage of any building, and ground cul-
 tivated as a garden, shall be marked thereon with *distinct

numbers corresponding with the numbers marked upon the parliamentary plans of the railway, and shall have put thereon a distinct valuation to each number, and all bridges, roads, and other works proposed to be made for the use and accommodation of the owners, lessees and occupiers of the lands adjoining the railway shall also be marked on the said maps or plans; and the company shall deposit such maps or plans, schedules and estimates, at the office of the commissioners of public works in Ireland, and a copy of such maps or plans, schedules and estimates, or so much thereof as relates to every county in or through which the railway is proposed to be made, with the clerk of the peace of each such county, and a copy of so much of the said maps or plans, schedules and estimates, as relates to each electoral division in which any such lands shall be situate, with the clerk of the poor law union in which every such electoral division is situate.

14 & 15 Vict.
c. 70.
Sect. 5.

V. After such deposit at the office of the said commissioners as aforesaid, it shall be lawful for the said commissioners, upon the application of the company, to appoint an arbitrator between the company and the persons interested in the lands to which such maps or plans, schedules and estimates relate, and such arbitrator shall, in relation to lands required and the works to be made and maintained by the company, as herein mentioned, be the arbitrator under this act; and if any such arbitrator die, or refuse, decline, or become incapable to act, the said commissioners may appoint an arbitrator in his place, who shall have the same powers and authorities as the arbitrator first appointed.

Commissioners of public works to appoint an arbitrator, on application of company.

VI. The arbitrator may call for the production of any documents in the possession or power of the company, or of any party making any claim under the provisions of this act, which such arbitrator may think necessary for determining any question or matter to be determined by him under this act, and may examine any such party and his witnesses, and the witnesses for the company, on oath, and administer the oaths necessary for that purpose.

Arbitrator may call for documents, and administer oaths.

VII. Before any arbitrator shall enter upon any inquiry, he shall, in the presence of a justice of the peace, make and subscribe the following declaration; that is to say,

Arbitrator to make and subscribe declaration.

I, A. B., do solemnly and sincerely declare, that I will faithfully and honestly, and to the best of my skill *and abil- [*386]

14 & 15 VICT.
c. 70.

Sect. 8.

ity, hear and determine the matters referred to me under the provisions of the act [*naming this act*].

A. B.

Made and subscribed in the presence of

And such declaration shall be annexed to the award when made; and if any arbitrator, having made such declaration, wilfully act contrary thereto, he shall be guilty of a misdemeanor.

[386]

Maps, &c.
deposited
with commis-
sioners of
public works
to be deliver-
ed to arbitra-
tor. Notice
of appoint-
ment of arbi-
trator, &c.
to be published.

VIII. Upon the first appointment of an arbitrator as aforesaid, the said commissioners shall deliver to such arbitrator the maps or plans, schedules and estimates, deposited at their office, as hereinbefore required; and the company shall forthwith after such appointment publish notice of such appointment, and of such deposits as hereinbefore directed with such clerk of the peace and clerks of poor law unions as aforesaid, once in the Dublin Gazette, and once in each of three successive weeks in some one and the same newspaper circulated in the county in which the lands are situate, stating the times and places of such deposits, and requiring all persons claiming to have any right to or interest in the lands required for the purposes of the railway, and specified in such maps or plans, or to have compensation for an injury to any lands injuriously affected by the execution of the works of the company, or to have any works made by the company for the accommodation of lands adjoining the railway, to deliver to the arbitrator, on or before a day fixed by the arbitrator, and named in such notice (and which day shall not be earlier than thirty one days from the date of the insertion of the last of such newspaper notices), a short statement in writing of the nature of such claim; and upon the appointment of any arbitrator in the place of an arbitrator dying or refusing, declining, or becoming incapable to act, all the documents relating to the matter of the arbitration which were in the possession of such arbitrator shall be delivered to the arbitrator appointed in his place, and the company shall publish notice of such appointment in the "Dublin Gazette."

Arbitrator to
adjudicate
upon com-
pensation to
be paid for
lands and up-
on accommo-
dation works

IX. The arbitrator shall, after the expiration of the period within which such claims are required to be delivered to him as aforesaid, proceed to inquire into and adjudicate upon the value of the lands required for the purposes of the railway, and specified in such maps or plans, and the several interests in such lands, in respect of which no agreement shall have

been come to between the company and the persons entitled *thereto, and the purchase money to be paid for such lands, and the compensation to be paid for injury to any lands injuriously effected by the execution of the works of the company, and to inquire and determine what works should be made and maintained by the company for the accommodation of lands adjoining the railway : and the arbitrator shall after due inquiry and examination, frame a draft award setting forth the price or compensation to be paid by the company in respect of the several interests in the lands so required and specified or injuriously affected, and the works to be made and maintained by the company for the accommodation of lands adjoining the railway ; and where any inquiry relates not only to the value of the lands to be purchased, but also to compensation claimed for injury done or to be done to any lands held therewith, the arbitrator shall award separate and distinct sums to be paid for the purchase of such lands or of any interest therein to which the inquiry may relate, and for the damage (if any) to be sustained by reason of the severing of the lands taken from the other lands, or otherwise injuriously affecting such other lands by the exercise of the powers of the company ; and such draft award, and copies thereof, or of so much thereof as relates to lands in the respective counties and electoral divisions, shall be deposited as hereinbefore directed concerning the said maps or plans, schedules, and estimates and copies thereof, or of so much thereof as aforesaid ; and the arbitrator shall cause notice of such award to be given to all persons entitled to payment or compensation, under the same, or who shall have been heard before such arbitrator as claimants for compensation, and also shall cause notice to be published as hereinbefore directed concerning notice of the deposit of copies of the said maps or plans, schedules and estimates, or so much thereof as aforesaid, of the deposit of copies of such draft award, or of so much thereof as aforesaid, and shall in such notices appoint a time and place, or times and places, for holding a meeting or meetings to hear objections against such draft award (the first such meeting to be not earlier than twenty-one days after the last day of publication of the said notice,) and shall hold such meeting or meetings accordingly, and thereat hear and determine any objections which may then and there be made to such draft award by any person interested therein, or adjourn the fur-

14 & 15 VICT.

c. 70.

Sect. 9.

[*387]

14 & 15 VICT.
c. 70.
Sect. 10.

[*388]

ther hearing thereof, if the arbitrator see fit, to a future *meeting, and may take any measures which he may deem proper for ascertaining the value of any such lands or interests as aforesaid, or the justice or propriety of any other matter of such draft award, and may from time to time, if he see occasion, appoint and hold further meetings for hearing and determining objections to such draft award, of which further meetings, when not holden by adjournment, notice shall be given in manner hereinbefore directed; and when the arbitrator has heard and determined all such objections, and made such inquiries as he may think necessary in relation thereto, and made such alterations (if any) as he may deem proper in the draft award, he shall make his award under his hand and seal accordingly; and every such award shall be binding and conclusive, subject to the provisions concerning traverse hereinafter contained, upon all persons whomsoever; and no such award shall be set aside for irregularity in matter of form; and every such award, and copies thereof, or of so much thereof as relates to lands in the respective counties and electoral divisions, shall be deposited as hereinbefore directed with respect to the said maps or plans, schedules and estimates and copies thereof, or of so much thereof as aforesaid; and the company shall thereupon publish notice, as hereinbefore directed concerning notice of the deposit of copies of such maps, or plans, schedules and estimates, or of so much thereof as aforesaid, of the deposit of copies of such award, or of so much thereof as aforesaid, and requiring all persons claiming to have any right to or interest in the lands, the price or compensation to be paid in respect of which is ascertained by such award, to deliver to the company, on or before a day to be named in such notice (such day not being earlier than thirty-one days from the date of the last publication of the notice,) a short statement in writing of the nature of such claim, and a short abstract of the title on which the same is founded; and such statement and abstract shall be paid for by the company.

Separate awards may be made as to lands in the several parishes or otherwise.

X. Provided always, that the arbitrator may make several awards, so as to include in a separate award the lands in each electoral division, or such portion of the lands in relation to which he is arbitrator as, having reference to the deposits to be made under this act, the meetings to be holden, and the inquiries to be made in relation to such lands,

and the convenience of the parties interested in the matter of the arbitration, he may think fit.

14 & 15 VICT.
c. 70.

Sect. 11.

*XI. Every clerk of the peace and clerk of any union is hereby required to retain the documents to be deposited with him under this act in his custody, and to permit all persons interested to inspect the same, and to make copies and extracts of and from the same, in the like manner, and upon the like terms, and under the like penalty for default, as is provided by an act of the session holden in the seventh year of King William the Fourth and the first year of her Majesty, chapter eighty-three.

[389]
Clerks of the
peace and
clerks of un-
ions required
to take charge
of documents
deposited, as
provided by
7 Will 4 & 1
Vict. c. 83.

XII. The salary or remuneration, traveling and other expenses of the arbitrator, and all costs, charges, and expenses (if any), which shall be incurred by the said commissioners of public works in carrying the provisions of this act into execution, shall be paid by the company; and the amount of such costs, charges, and expenses shall from time to time be certified by the said commissioners, after first hearing any objections that may be made to the reasonableness of any such costs, charges, and expenses by or on behalf of the company; and it shall be lawful for the said commissioners from time to time to require the company to deposit in the bank of Ireland, to the credit of the said commissioners, any sum or sums of money, or to give such other security for the payment of any such costs, charges, and expenses as to the said commissioners shall seem fit; and every certificate of the said commissioners, certifying the amount of such costs, charges, and expenses, shall be taken as proof in all proceedings at law or in equity of the amount of such respective costs, charges, and expenses, and the amount so certified shall be a debt due from the company to the crown, and shall be recoverable accordingly.

Expenses of
the arbitrator
to be borne
by the com-
pany.

XIII. It shall be lawful for the arbitrator, where he thinks fit, upon the request of any party by whom any claim has been made before him, to certify the amount of the costs properly incurred by such party in relation to the arbitration and the amount of the costs so certified shall be paid by the company; and if within seven days after demand, the amount so certified be not paid to the party entitled to receive the same, such amount shall be recoverable by distress, and on application to any justice he shall issue his warrant accord-

Costs of
parties.

14 & 15 VICT.
c. 70.

Sect. 14.

[*390]

Certificates
of amount of
compensa-
tion to be de-
livered by
company.

ingly; but no such certificate shall be given where the arbitrator has awarded the same, or a less sum than has been offered by the company in respect of such claim before the commencement of the arbitration.

*XIV. Within thirty days from the delivery of such statement and abstract as aforesaid to the company, the company shall, where it appears to them that any person so claiming is absolutely entitled to the lands, estate, or interest claimed by him, deliver to such person, on demand, a certificate under the company's seal, stating the amount of the price or compensation to which he is entitled under the said award; and where more lands than are included in one number shall be claimed by the same person, such lands, or the interests therein, may be included in one certificate, if the company think fit, such certificates to be prepared by and at the costs of the company; and where any agreement has been entered into in respect to the value of the interest of any person in any lands, or his right to compensation, the company may, where it appears to them that such person is absolutely entitled, deliver to such person a like certificate.

Amount
mentioned in
certificates to
be paid to
parties on
demand, &c.

XV. The company shall, on demand, pay to the party to whom any such certificate is given, or otherwise as herein provided in the cases hereinafter mentioned, the amount of monies specified to be payable by such certificate to the party to whom, or in whose favor such certificate is given, his or her executors, administrators, or assigns, and if the company wilfully make default in such payment as aforesaid, then the party named in such certificate shall be entitled to enter up judgment against the company in the Court of Queen's Bench in Ireland, for the amount of the sums specified in such certificate, in the same manner in all respects as if he had been by warrant of attorney from the company, authorized to enter up judgment for the amount mentioned in the certificate, with costs, as is usual in like cases; and all monies payable under such certificates, or to be recovered by such judgments as aforesaid, shall at law and in equity be taken as personal estate as from the time of the company entering on any such lands as aforesaid.

When
amount men-
tioned in cer-
tificates is

XVI. When and so soon as the company have paid to the party to whom any such certificate as aforesaid is given, or otherwise, as herein provided, in the cases hereinafter men-

tioned, the amount specified to be payable by such certificate to the party to whom or in whose favor the certificate is given, his executors, administrators, or assigns, it shall be lawful for the company, upon obtaining such receipt as hereinafter mentioned, from time to time to enter upon any lands in respect of which such certificate is given, and *thenceforth to hold the same for the estate or interest in respect of which the amount specified in such certificate was payable.

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c. 70
Sect. 17.
paid to
parties, com-
pany may
take posses-
sion.

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XVII. In every case in which any monies are paid by any company under the provisions of this act, for such price or compensation as aforesaid, the party receiving such monies shall give to the company a receipt for the same, and such receipt shall have the effect of a grant, release, and conveyance of all the estate and interest of such party, and of all parties claiming under or through him, in the lands in respect of which such monies are paid, so as such receipt shall have an *ad valorem* stamp of the same amount impressed thereon in respect of the purchase monies mentioned in such certificate (but exclusive of the amount of compensation for damage by severance or other injury) as would have been necessary if such receipt had been an actual conveyance of such estate or interest, every such receipt to be prepared by and at the costs of the company.

Receipts duly stamped to operate as a conveyance.

XVIII. If it appear to the company, from any such statement and abstract as aforesaid, or otherwise, that the party making any such claim as aforesaid is not absolutely entitled to the lands, estate or interest in respect of which his claim is made, or is under any disability, or if the title to such lands, estate, or interest be not satisfactorily deduced to the company, then and in every such case the amount to be paid by the company in respect of such lands, estate, or interest as aforesaid shall be paid and applied as provided by the clauses of "The Lands Clauses Consolidation Act, 1845," with respect to the purchase money or compensation coming to parties having limited interests, or prevented from treating, or not making title (a)

Payment of monies where parties making claims deemed not entitled, or as under disability, or title not satisfactorily deduced.

(a) *Ante*, p. 308—323.

XIX. Where any person claiming any right or interest in any lands shall refuse to produce his title to the same, or where the company have taken possession of any lands under

Where no claim made or parties refuse to ac-

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cept sum cer-
tified, money
to be paid
into the
bank.

the provisions of this act in respect of the price or compensation whereof, or of any estate or interest wherein, no claim has been made within one year from the time of the company taking possession, or if any party to whom any such certificate has been given or tendered refuse to receive such certificate, or to accept the amount therein specified as payable to him, then and in any such case the amount payable by the company in respect of such lands, estates, *or interest, or the amount specified in such certificate, shall be paid into the bank of Ireland, in the name and with the privity of the accountant general of the Court of Chancery in Ireland, in manner provided by the last mentioned clauses of "The Lands Clauses Consolidation Act, 1845," and the amount so paid into the said bank shall be accordingly dealt with as by the said act provided: and no monies paid into the bank under this act shall be liable to usher's poundage.

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Nothing to
prevent com-
pany requir-
ing further
evidence of
title at their
cost.

XX. Nothing herein contained shall prevent the company from requiring any further abstract or evidence of title respecting any lands included in any such award as aforesaid, in addition to the abstract or statement hereinbefore mentioned, if they think fit, so as the same be obtained at the costs of the company.

Delivery of
certificate
may be en-
forced by
Court of
Chancery.

XXI. If from any reason whatever the company shall not deliver the certificate aforesaid to any party claiming to be entitled to any interest in any lands the possession whereof has been taken by the company as aforesaid, then the right to have a certificate according to the provisions of this act may, at the costs and charges of the company, be enforced by any party or parties, by application to the High Court of Chancery in Ireland in a summary way by petition, and all other rights and interests of any party or parties arising under the provisions of this act may be in like manner enforced against the company by such application as aforesaid.

After deposit
of draft
award com-
pany may,
upon deposit
of such
amount as
arbitrator
may think
fit, enter up-
on lands.

XXII. Provided always, that where the company are desirous, for the purposes of their works, of entering upon any lands before they would be entitled to enter thereon under the provisions hereinbefore contained, it shall be lawful for the company, at any time after the arbitrator shall have framed his draft award, upon depositing in the bank of Ireland, as herein directed, such sum as the arbitrator may certify to be in his opinion the proper amount to be so deposited in respect

of any lands authorized to be purchased or taken by the company, and mentioned in such draft award, to enter upon and use such lands for the purposes of the railway and works of the company; and the arbitrator shall, upon the request of the company, at any time after he shall have framed such draft award, certify under his hand the sum which in his opinion should be so deposited by the company in respect of any lands mentioned in such draft award before they enter upon and use the same as aforesaid, and the sum to be so certified shall be the sum or the *amount of the several sums set forth in such draft award as the sum or sums to be paid by the company in respect of such lands, or such greater amount as to the arbitrator, under the circumstances of the case, may seem proper; and, notwithstanding such entry as aforesaid, all proceedings for and in relation to the completion of the award, the delivery of certificates, and other proceedings under this act, shall be had, and payments made, as if such entry and deposit had not been made; provided that the company shall, where they enter upon any lands by virtue of this present provision, pay interest at the rate of five pounds *per centum per annum* upon the purchase and compensation money payable by them in respect of any lands so entered upon, from the time of their entry until the time of the payment of such money and interest to the party entitled thereto, or where, under the provisions of this act, such purchase money or compensation is required to be paid into the said bank, then until the same, with such interest, is paid into such bank accordingly; and where under this provision interest is payable on any purchase or compensation money, the certificate to be delivered by the company in respect thereof shall specify that interest is so payable, and the same shall be recoverable in like manner as the principal money mentioned in such certificate.

XXIII. The money to be deposited as aforesaid in respect of any lands shall be paid into the bank of Ireland in the name and with the privity of the accountant general of the Court of Chancery in Ireland, to be placed to his account there to the credit of the company (describing the company by its proper name), in the matter of the Railways Act (Ireland), 1851, and of the lands in respect of which the same is paid, subject to the control and disposition of the said court and upon such deposit the cashier of the said bank shall give

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c. 70.
Sect. 22.

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Mode of
deposit.

14 & 15 VICT.
c. 70.

Sect. 21.
Deposit to
remain as a
security, and
to be applied
under the
direction of
the court.

to the company or to the party paying in such money by their direction, a receipt for the same.

XXIV. The money so deposited as last aforesaid shall remain in the bank by way of security to the parties interested in the lands which shall so have been entered upon, for the payment of the money to become payable by the company in respect thereof under the award of the arbitrator; and the money so deposited may, on the application by petition of the company, be ordered to be invested in bank annuities or government securities, and accumulated; and upon such *payment as aforesaid by the company it shall be lawful for the Court of Chancery in Ireland, upon a like application, to order the money so deposited, or the funds in which the same shall have been invested, together with the accumulation thereof, to be repaid or transferred to the company, or, in default of such payment as aforesaid by the company, it shall be lawful for the said court to order the same to be applied in such manner as it shall think fit for the benefit of the parties for whose security the same shall so have been deposited.

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Company
may deposit
money by
way of security while the
office of the
accountant
general is
closed.

XXV. If at any time the company be unable, by reason of the closing of the office of the accountant general of the said Court of Chancery, to obtain his authority in respect of the payment of any sum of money so authorized to be deposited in the bank by way of security as aforesaid, it shall be lawful for the company to pay into the bank, to such credit as aforesaid (subject nevertheless to being dealt with as herein provided), such sum of money as the company shall by some writing signed by their secretary or solicitors for the time being, addressed to the governor and company of the bank in that behalf, request, and upon any such payment being made the cashier of the bank shall give a certificate thereof; and in every such case, within ten days after the reopening of the said accountant general's office, the solicitor for the company shall there bespeak the direction for the payment of such sum into the name of the accountant general, and upon production of such direction at the Bank of Ireland the money so previously paid in shall be placed to the credit of the said accountant general accordingly, and the receipt for the said payment be given to the party making the same in the usual way, for the purpose of being filed at the report office.

XXVI. Where the party named in any certificate issued under the provisions hereinbefore contained of the amount of the price or compensation ascertained by any award under this act (or any party claiming under the party so named) shall be dissatisfied with the amount in such certificate certified to be payable, and where any party claiming any interest in any money so paid into court as aforesaid shall be dissatisfied with the amount of the price or compensation in respect of which such monies shall be so paid into court, and where any party interested in land adjoining any railway shall be dissatisfied with any award under this act so far as respects any works for the accommodation *of such lands thereby awarded to be made and maintained by the company, or which such party may claim to have so made and maintained, it shall be lawful for such party, at the assizes for the county in which the lands are situate; or where the lands are situate in the county of Dublin or county of the city of Dublin, in the term next following the giving of such certificate, or the payment of such money into court, or (if the claim be only in respect of accommodation works) the making of the award, or where such assizes are holden or such term begins within less than twenty-one days after the giving of such certificate, or the payment of such money, or the making of the award, then at the next subsequent assizes, or in the next subsequent term (as the case may be), upon giving ten days notice in writing previously to such assizes or term respectively to the secretary of the company, of the amount or the accommodation works intended to be claimed, to have a traverse for damages entered in the crown book in respect of such claim, and thereupon such traverse shall be tried in like manner and like proceedings shall be had, and subject to like provisions, as far as the same can be applied, as in the case of traverses entered for damages under the acts for consolidating and amending the laws relating to the presentment of public monies by grand juries in Ireland: provided always, that the sum to be awarded or allowed as the costs, charges, and expenses of the trial of every such traverse for damages shall in no case exceed the sum of twenty pounds, and further that no party shall have any other remedy for the purpose of impeaching the amount of any price or compensation ascertained by any such award as aforesaid, or the sufficiency of the accommodation works awarded thereby, other

14 & 15 Vict.
c. 70.

Sect. 26.
Parties, dissatisfied with award may enter a traverse at assizes.

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14 & 15 Vict. than by means of such traverse as aforesaid, anything in any
 c. 70. act to the contrary notwithstanding: provided also, that the
 Sect. 27. jury which shall try such traverse shall be sworn a true ver-
 dict to give, whether any and what damages will be sustained
 by the traverser, regard being had to the value of the lands
 of such traverser required, and to the injury to any lands
 of such traverser injuriously affected by the works of the
 company, or (as the case may be) as to what accom-
 modation works ought to be made and maintained by the
 company for the accommodation of the lands of the trav-
 erser, or to the like effect respectively, as the case may be.

Verdict on
 traverse to
 have effect of
 judgment.
 [*396]

XXVII. The entry of the verdict of the jury in case *of
 each traverse in the crown book shall be a final decision, and
 binding upon all parties interested, and shall have the effect
 of a judgment at law obtained in the Court of Queen's Bench
 in Ireland against the company, and may be enforced by
 like remedies against the company, as in the case of a judg-
 ment at law, by all parties interested therein; and in each
 case where a certificate shall have been delivered, such dam-
 ages shall be taken and recovered in lieu of the monies ex-
 pressed to be payable by the certificate, and which shall, on
 payment of the damages, and any costs payable by the com-
 pany, be delivered up to the said company, and such receipt
 for such damages shall be given as is hereinbefore provided
 in cases of payment of monies on such certificates as
 aforesaid; and where such damages shall be given in respect
 of any land, the amount of the price or compensation in res-
 pect of which, as ascertained by an award under this act,
 shall have been paid into court, then if the amount of such
 damages shall be less than the amount paid into court, the
 company shall, on a summary application by petition, be en-
 titled to receive the difference between the amount of such
 damages and the amount of the sum paid into court, but if the
 amount of such damages shall exceed the amount of the
 monies paid into court then the difference between the amount
 paid in and the damages shall, at the costs of the company,
 be paid into court; and the payment of such difference into
 court, and the payment of any costs payable by the company
 in respect of such traverse, shall be a good discharge to the
 company on any such verdict in the nature of a judgment as
 aforesaid.

Act to apply
 to the pur-

XXVIII. The provisions of this act shall extend to the

1 Railw. C. 347; 10 Ad. & E. 793; 2 P. & D. 714; see 14 & 15 Vict.
purchase by the company of lands for extraordinary pur-
poses. c 70.

XXIX. All the provisions of "The Lands Clauses Con-
solidation Act, 1845," shall, subject to the provisions
herein contained, extend to and be taken as part of this
act, except so far as the same are inconsistent therewith.

chase of land
for extraordi-
nary purpos-
es.

Provisions of
8 & 9 Vict.
c. 18, incor-
porated with
this act.

Meaning of
"the com-
pany."

Act to ex-
tend to Ire-
land only.

Continuance
of act five
years.

XXX. In the construction of this act the words "the
company" shall mean the company constituted by the special
act.

XXXI. This act shall extend to Ireland only.

XXXII. This act shall continue in force for five years
next after the passing thereof, and thence to the end of the
then next session of parliament.

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*RAILWAYS CLAUSES CONSOLIDATION
ACT, 1845.

8 & 9 VICT.
c. 20.

8 & 9 VICTORIA, c. 20.

Sect. 1.

An Act for consolidating in One Act certain Provisions usually inserted in Acts authorizing the making of Railways.

[8th May, 1845.]

Application of Act to future Incorporated Companies.

Operation of
this act con-
fined to
future rail-
ways.

WHEREAS it is expedient to comprise in one general act sundry provisions usually introduced into acts of parliament authorizing the construction of railways, and that as well for the purpose of avoiding the necessity of repeating such provisions in each of the several acts relating to such undertakings as for ensuring greater uniformity in the provisions themselves: and whereas a bill is now pending in parliament, entitled "An Act for consolidating in One Act certain Provisions usually inserted in Acts authorizing the taking of Lands for Undertakings of a Public Nature," and which is intended to be called "The Lands Clauses Consolidation Act 1845:" (a) be it therefore enacted, that this act shall apply to every railway which shall by any act which shall hereafter be passed be authorized to be constructed, and this act shall be incorporated with such act; and all the clauses and provisions of this act, save so far as they shall be expressly varied or excepted by any such act, shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other act which shall be incorporated with such act, form part of such act, and be construed together therewith, as forming one act (b).

(a) 8 & 9 Vict. c. 18. s. 1, *ante*, pp. 221—282.

*Of Agreements before the Act is obtained.*8 & 9 Vict.
c 20.

Sect. 1.

(b) Securities given to persons who would be prejudiced by the passing of a private bill in parliament, in consideration of their withdrawing their opposition to it, are not illegal. On a proposal to build a bridge at Vauxhall, the proprietors of Battersea bridge objected, as their tolls would be diminished; and it could not be said that there was anything fraudulent in their doing what they could to prevent the completion of the project of building a bridge near them. It was first agreed that some remuneration should be given them, which was to be secured to them by the act, but, in consequence of something which fell from some of the committee on that bill, they imagined that scruples would be entertained about it. They then determined not to ask for anything in the act, but on an adequate remuneration being secured in another way, to agree to make no opposition to the bill. It was argued that there was a fraud on the legislature, but Lord Eldon, C., thought it would be a going a great way to say so, for *non constat*, if it had been pushed to the extent of taking the opinion of the House that it might not have passed the bill in its former shape. It cannot be said that the agreement is contrary to legislative policy, because one member of the committee makes an objection which is not sanctioned by the House; indeed, such things are constantly done, and with the knowledge of the House; for they are in the habit of [saying, with respect to these private acts, that though they will not of themselves pass them into laws, yet they will, if the parties can agree; and matters are sometimes permitted to stand over to give an opportunity of coming to a settlement. (*Vauxhall Bridge Co. v. Earl of Spencer*, Jac. 64; 2 Madd 356.) Lord Langdale thought it had almost become a rule, "that wherethe property of the party does not possess any peculiar value, parliament will adopt the course which has become all but general in such cases; but if the property does possess some peculiar value,—if it is to pass over a certain portion more valued than any other,—if it invade a right to

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8 & 9 VICT. which the owner may be considered to be more peculiarly
 c. 20. attached,—in such cases, parliament will facilitate and encourage agreements between the parties who possess such properties and those who desire to take them away ; and, in cases in which those agreements cannot be at once framed, will refer the parties to an agreement to be subsequently entered into between themselves." (*Gray v. Liverpool and Bury Railw. Co.*, 4 Railw. C. 241 ; 9 Beav. 391.)

Agreement
 to withdraw
 opposition in
 parliament.

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An agreement had been entered into between the plaintiff, Lord Howden, a peer of parliament, and the defendants, projectors of a railway company, whereby, in consideration of the plaintiff's withdrawing, his opposition to a bill then before the House of Lords for authorizing the undertaking, the defendants contracted to pay to the plaintiff 5,000*l.*, and to endeavor to procure in the then next session of parliament an act to authorize a deviation from the then contemplated line. The deed contained many other stipulations, but no one which expressly stated, or from which it could be implied, that the agreement, or any part of it, was to be kept secret. In an action to recover the 5,000*l.*, the declaration on the above deed alleged that the act passed, and *that some months had since elapsed, and that the money was not paid. It was pleaded that this agreement was void on these grounds ; first, because it had been concealed from the legislature ; secondly, because concealed from the other landholders ; and, thirdly, because the plaintiff being a peer of parliament could not legally enter into an agreement of that sort. It was held by the Court of Exchequer Chamber, reversing a judgment of the Court of Queen's Bench, that the agreement was valid, and that the plaintiff was not bound to communicate to the legislature the bargain he had made with the company. It was held, also, by the Court of Exchequer Chamber that the plaintiff was not bound to communicate the agreement to the other landholders, and that a member of the legislature could make any terms for the sale of his land, and compensation for injury to his comforts and property, which it is lawful for a private individual to make. (*Lord Howden v. Simpson*,

Report of the proceedings in Equity, 1 Railw. C. 326—346; 8 & 9 VICT. c. 20.
Sect. 1.
Lord Petre v. Eastern Counties Railw. Co., 1 Railw. C. 462.) It was held by the House of Lords (affirming the judgment of the Exchequer Chamber), that the agreement was valid, and that a member of the Legislature may make terms for the sale of his land, and compensation for injury to his comforts and property, it not appearing by the record that the money was promised as a consideration for his vote, or that the parties intended to conceal it from the land-owners or from the legislature, or that any fraud was intended. (*Simpson v. Lord Howden*, 3 Railw. C. 294.) Tindal, C. J., in giving judgment said, we can have no hesitation in saying that if it were averred in the plea and proved that the sum of 5,000*l.* or any part of it was really paid as a consideration for Lord Howden's giving his vote for or withholding his vote against the bill, and that the statement in the deed was in this respect a mere color to conceal the real nature of the transaction, the deed would have been thereby rendered corrupt and illegal, and consequently void, and that no action would lie for any part of the money. But illegality is not to be presumed; it is to be alleged and proved where it does not appear on the face of the instrument itself. (*Lord Howden v. Simpson*, 10 Ad. & E. 820, 821; 9 Cl. & Fin. 61.)

After the action had been brought by Lord Howden upon the above agreement, the defendants in the action filed a bill praying that such agreement might be declared to be against public policy, and that the same was void at law and ought to be delivered up to be cancelled, and for injunction to restrain further proceedings at law; Lord Howden demurred to the bill generally for want of equity. It was decided by Lord Cottenham, C., reversing the decision of Lord Langdale, M. R. (see 1 Keen, 583; 1 Jur. 117; 1 Railw. C. 326) that where the illegality of an instrument (if it be illegal) appears upon the face of the instrument itself, and is a question cognizable at law, a court of equity has no jurisdiction to order the instrument to be delivered up and cancelled, *and that the circumstances of a question of construction [*400]

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arising upon the instrument, supposing it to be valid, afforded no ground for equitable interference, where that question could be dealt with as well at law as in equity. (*Simpson and others v. Lord Howden*, 1 Railw. C. 326; 3 My. & Cr. 97; 1 Jur. 703.)

The committee of certain subscribers, applying for an act of parliament to authorize the formation of a railway, entered into an agreement with the plaintiff, a peer of parliament, through whose estates the railway was intended to pass, that in consideration of his withholding his opposition to their bill, the incorporated company, in the event of the railway being under the powers of their act made to pass through the plaintiff's estates in the line laid down in their parliamentary plan, should, previous to entering thereon, pay to the plaintiff the sum of 120,000*l.* for the value of the land and for compensation; and that the company should, within three weeks after their incorporation, ratify the agreement. The plaintiff withheld his opposition to the bill, and it passed into an act. The incorporated company refused to ratify the agreement, and being empowered by their act to take compulsorily the plaintiff's land in the line mentioned in the agreement, served on him a notice to treat for the same. The plaintiff having filed his bill, obtained an injunction, restraining the company from proceeding to assess the value of such lands; and the injunction was afterwards continued, notwithstanding the tender of an undertaking on the part of the company not to enter on the land until the further order of the court; and notwithstanding the time during which the company were authorized to take lands for the railway would have expired before the hearing of the cause. (*Lord Petre v. Eastern Counties Railw. Co.*, 1 Railw. C. 642; see *Reg. v. York and North Midland Railw. Co.*, Law. J. 1845, Q. B. 277; *post*, s. 68, n.) Recently the decisions in the cases last cited have been in some measure questioned; but Lord *St. Leonards*, C., said that they establish, without the slightest doubt in his mind, that a *bona fide* agreement of that sort, not evading the act of parliament, but enabling the company to assist its views and

carry the act of parliament into effect, whether for a smaller or larger consideration, is perfectly valid. (*Hawkes v. Eastern Counties Railw. Co.*, 7 Railw. C. 210; 1 De G. M. & G. 737. See Lord *Cottenham's* observations in *Great Western Railw. Co. v. Birmingham and Oxford Junction Railw. Co.*, 2 Phill. C. C. 604, 605.)

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c. 20.
Sect. I.

By an agreement under seal between the plaintiff and the defendants, promoters of a bill in parliament for making a railway, after reciting that the line of railway was proposed to be carried close to the plaintiff's park, and through some of his land, which bill he opposed, he, in consideration of the covenants therein contained, acceded thereto. It was witnessed that, in consideration of the covenants on the defendant's part, the plaintiff did covenant that he would accede to the bill, provided it passed in the present or ensuing session of parliament; and, in consideration of the assent *given to the bill by the plaintiff, the defendants covenanted, that, in the event of the bill passing, the company should pay him for so much land intersected by the line as might be required, at the rate of 120*l.* per acre; and that they should pay him 3000*l.* in full compensation for the general damage which the line should or might do to the mansion, park, and estate, including therein the crossing of the road near the entrance of the park, the obstruction of views, &c., the expense of temporary residence during the progress of the works, the depreciation in value as a residence, the additional expense in the cultivation of the farms by the alteration of the road, and all other damage to be done to the mansion and park. And the plaintiff agreed, on tender of 120*l.* per acre, and 3000*l.*, that he would convey: it was held, by *Parke, B.*, and *Platt, B.*, that the defendants had thereby bound themselves that the company should pay the 3000*l.* on the passing of the act, although the railway should not be constructed, or any actual damage be done to the plaintiff's estate; but *Pollock, C. B.*, was of opinion that the taking of the land and damage done were conditions prece-

Agreements
with land-
owner en-
forced, al-
though rail-
way not
made.

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8 & 9 VICT. c. 20. dent to the payment of the 3000*l*. (*Bland v. Crowley*, 6 Railw. C. 756; 6 Exch. 522.)

Sect. 1.

Of construction of contracts, and what binding upon the parties.

[401]

(1) A Railroad Corporation, after locating its road over a wharf *more than sixty feet*, filing the location with the County Commissioners, agreed with the owners of the wharf to extend the road sixty feet on and over the same before a certain day, and the owners in consideration thereof agreed not to demand any damages for such extension. The road having been made, according to the location filed, previous to such agreement, it was held, this was not an agreement of the Corporation, not to extend their road *more than sixty feet over the wharf*, and that the owners of the wharf were not thereby entitled to apply after three years from the filing the location, for an estimate of damages caused by the extension of the road *more than sixty feet over the wharf*. (*Charlestown Branch Railroad Co. v. County Commissioners*, 7 Met. 78.)

A contract to pay a Railroad Company a given sum, if they will locate the line of the road at a particular place is binding, and may be enforced by action. (*Cumberland Railroad Co. v. Baab*, 9 Watts 458.)

Contract not binding before entry upon lands.

A railway company being about to construct a railway through the plaintiff's lands, and having a bill before parliament for that purpose, covenanted with him "that in the event of the bill being passed in the then present session of parliament, the company shall, before they enter upon any part of the land, pay the sum of 4,900*l*. purchase-money for any portion of his land not exceeding forty acres, which the company, under the powers of their act, require and take for the purpose of their undertaking; that, in addition to the purchase-money, the company shall pay to the plaintiff, before they shall enter upon any part of the said land, the sum of 7,100*l*., as a landlord's compensation for the damage arising to his estate by the severance thereof, in respect of the lands, not exceeding forty-three acres, to be taken by them." The bill passed in the session mentioned in the covenant, but the railway and works mentioned in the agreement and in the act had not been begun, and the company had not required or taken any of the lands. In an action

to recover the 7,100*l.*, it was held that the deed did not bar gain for a sum of money to be paid absolutely by the company to the plaintiff as a consideration for his withdrawing his opposition to the bill, but provided a peculiar mode of estimating the value of the land to be taken, and of the compensation to be made for the severance and damage, instead of the modes pointed out by the general acts upon the subject. That if the deed could bear such a construction, it was so far *ultra vires* and void, for the capital paid up by the shareholders must be answerable for the damages to be recovered, which would be a misappropriation of the funds, which the directors could not lawfully make. (*Gage v. Newmarket Railw. Co.*, 7 Railw. C. 168.) Lord St. Leonards, C., disapproved of the doctrine in this case that the company could not bind itself beyond its powers, and *said it required great consideration how far the doctrine should be carried. It is a great and serious question how far railway companies can be allowed to enter into contracts solemnly under their seal, and then turn round upon the parties and say they have exceeded their powers, and consequently refuse to perform their contracts. (*Hawkes v. Eastern Counties Railw. Co.*, 7 Railw. C. 219; 1 De G. M. & G. 737.)

8 & 9 VICT.
c. 20.
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By an agreement for the purchase of land comprised in certain marriage settlements, the defendants (the managing committee of a projected railway company) agreed, that if their bill, then pending, should pass in the then present or next session of parliament, they would, within six calendar months afterwards, pay to the plaintiffs the purchase-money; the whole of the agreement was to be null and void, unless sanctioned by the Court of Chancery; and so much of the agreement as the court should require was to be inserted in the act. It was held, on demurrer to a plea that it was a condition precedent to the plaintiff's recovering the purchase-money, that the agreement should be sanctioned within six calendar months after the passing of the act. (*Porcher v. Gardner*, 14 Jur. 43; 19 Law. J. C. P. 63; 3 C. B. 461.)

Condition
precedent.

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c. 20.

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A bill before parliament for the purpose of enabling one railway company to grant to another railway company a lease of certain contemplated lines of railway, was opposed by a third company. An agreement was ultimately come to, by which, in consideration of a third company withdrawing their opposition, the other two companies engaged to conduct their traffic in a certain specified manner, so as not to prejudice the interests of the third company: it was held, overruling demurrers filed to a bill by the third company, for a specific performance of this agreement, that that there was nothing in the agreement contrary to the duty which the parties respectively owed to parliament, or to the public and their own subscribers. (*Shrewsbury and Birmingham Railw. Co. v. London and North Western Railw. Co.*, 2 Mac. & G. 324; 2 Hall & T. 257; 14 Jur. 921; 20 L. J. Chanc. 90.)

It was held, also, on the construction of the act of parliament, that the operation of the agreement was not postponed until all the contemplated lines were completed; but that the rights and liabilities of the two companies inter se, on which the agreement with the third company depended, arose on the completion of any one of the contemplated lines. (*Ib.*)

Contract enforced although project abandoned. j

By an agreement under the corporate seal of a railway company, who were the promoters of a bill in parliament for a branch line from their railway to Spalding, with an extension, to form a junction with the Ambergate Railway, the company agreed conditionally, on the bill passing, to purchase the whole of the plaintiff's lands, of part of which he was owner in fee-simple, and of the other part only tenant for life, and to obtain all necessary powers for enabling them to complete the purchase. One third only of

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*the plaintiff's land was within the limits of deviation, and directly affected by the bill in parliament. The objects of the agreement were to induce the plaintiff to withdraw his opposition to the bill, and also to enable the company to form, independently of parliament, by means of a diverging

line passing through a part of his land not included in the deposited plans, a junction with the Ambergate Railway, in the event of the extension proposed by the company's bill being rejected by parliament. There was nothing in the agreement or in the evidence to show that the plaintiff knew of the latter object of the company. The bill passed into an act, with a clause prohibiting the formation of the extension line, but giving the company power to purchase land, not exceeding thirty acres, for extraordinary purposes. The company afterwards abandoned the whole of the proposed undertaking, and declined to perform the contract, whereupon the plaintiff filed his bill. *Bruce, V. C.*, decreed specific performance of the contract, and directed a reference to the Master as to the plaintiff's title. The Master, by his report, having approved the title, the defendants took exceptions to the report, which were overruled. Lord *St. Leonards, C.*, on appeal, affirmed the decisions of the court below on the hearing and exceptions: and held that an incorporated railway company, acting as the promoters of a bill for the extension of their line, are competent to bind themselves by contract with a landowner, conditionally on the act passing, for the purchase of the whole of his property, although a portion only of it was directly affected by the bill: it was also held, that a company cannot release itself from a contract so entered into by impediments of their own creating, such as allowing the powers for the compulsory purchase of land (see *ante*, pp. 363—366), or the completion of a railway, to expire, or omitting to pursue the forms prescribed by the Lands Clauses Consolidation Act, or upon any grounds of supposed illegality in the contract, of which the landowner is not shown to be conusant. (*Hawks v. Eastern Counties Railw. Co.*, 7 Railw. C. 188; 3 De G. & S. 743; 15 Jur. 979; 20 Law J. Ch. 243; 1 De G. M. & G. 737.)

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To a declaration on an indenture between the plaintiff and the defendants, the provisional directors of a projected railway company, called the Direct Northern, after re-

Covenant to
pay certain
sum on
amalgama-
tion of com-
panies.

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citing that the plaintiff was owner of certain lands through which that railway and another, called the Great Northern, were intended to pass, and that the plaintiff would support the former and oppose the latter line, it was covenanted, that if the Direct Northern's bill should pass before six months from the date of the deed, the company should pay the plaintiff certain sums of money, in certain specified cases, for the injury done to and for the purchase of his land; that if the Great Northern's bill should pass within eighteen months from the same date, the Direct Northern was to pay the plaintiff, within three months after that event, certain sums of money, in certain specified cases, for compensation, &c.; provided, that if no act authorizing the

[*404] *Direct Northern to make their line should be passed within six months from the date of the indenture, each party might put an end to the agreement by giving notice in writing; and that, after the giving of such notice, the agreement and everything contained in it should be absolutely null and void, except the proviso and a covenant as to certain costs to be paid to the plaintiff; and, lastly, that if the companies should be amalgamated, that then, three months after such event, the amalgamated companies should pay certain sums of money in certain events, one of these being the sum of 6000*l.*, if the line followed the course of the direct line, without a branch to Stamford; and that, in such case, all the covenants applicable were to be performed by the amalgamated companies. The declaration, after alleging that companies were amalgamated, that the line took the line of the Direct Northern, without a branch to Stamford, and that the period of three months had elapsed, concluded with laying as a breach the non-payment of the 6000*l.* The defendants pleaded, that no act of parliament authorizing the Direct Northern to make their extended line, was passed within six calendar months; and that the defendants gave the plaintiff notice that they were desirous to put an end to the agreement; and that no part of the line had passed through plaintiff's estate, or that it had been injured under

the act: it was held, on general demurrer, that the plea was a good answer to the action. (*Earl Lindsey v. Capper* 1 Exch. Rep. 579.) But upon a writ of error being brought, it was decided that the amalgamation clause following immediately after the proviso was to be taken as a part of and qualification of that proviso, and were to be read together; and that being so read, the true effect and meaning, is, that if no bill to which the defendants are parties should pass within the six months, notice might be given by either the plaintiff or defendants, to determine and put an end to the deed; but that, if any such bill did pass within six months (as in truth it had), the covenants in the amalgamation clause were to stand good and be observed. Therefore, that the plea, which negatived only the first contemplated event, and not the third, was not an answer to the action. (S. C. 2 Exch. 801; 3 H. L. C. 293.)

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Sect. 1.

H. and Y., and several other persons, calling themselves the Lancashire and North Yorkshire Railway Company, introduced a bill into parliament for incorporating the company and making their railway, which was intended to pass through the plaintiff's estate and near his residence. The plaintiff prepared to oppose the bill, but afterwards desisted, in consequence of H. and Y., having agreed with him, on behalf of the company, that, in case the company should, in the then or any subsequent session, obtain an act of incorporation, they would pay the plaintiff 1000*l.* for all lands required by them for making the railway, and 4000*l.* for residential injury, and 25*l.* for his personal expenses, and, also, that they would pay the expenses of his solicitor in the business. Afterwards the company agreed to join with *a rival company, calling itself the Liverpool, Manchester, and Newcastle Company, in applying for an act for making a railway, the line of which, so far as the plaintiff's estate was concerned, was the same as the line of the Lancashire and North Yorkshire Company; and the two companies agreed to adopt the agreement with the plaintiff. The act passed, and by it the two companies were incorporated by

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Sect. 1.

[405] the name of The Liverpool, Manchester and Newcastle Railway Company: it was held, that the incorporated company must be taken to be the parties on whose behalf H. and Y. entered into the agreement with the plaintiff. (*Preston v. Liverpool, Manchester and Newcastle-upon-Tyne Junction Railw. Co.*, 1 Sim. N. S. 583; 7 Railw. C. 1.)

The court also was of opinion that, as the plaintiff had withdrawn his opposition to the bill in parliament, the company, according to the true construction of the agreement, were bound to pay the sums agreed to be paid to him, although they had not taken possession of any part of his estate. But, the question as to the construction of the agreement being a legal one, a case was directed for the opinion of a court of law. (*Ib.*)

Specific performance refused where railway abandoned.

A contract was entered into by the promoters of a railway company with a landowner to pay a certain sum for the portion of his lands to be taken for the intended railway and for consequential damage, in consideration of which agreement the landowner withdrew his opposition to the bill. It was held by Turner, V. C., to be binding, although, after the passing of the act, the intention of making the railway had been abandoned, and no part of the land had been taken or required. (*Webb v. Direct London and Portsmouth Railway Co.*, 9 Hare, 129; 15 Jur. 697; 20 L. J. Chanc. 566; 7 Railw. C. 9.)

Specific performance was decreed of an agreement to pay, for the lands to be taken for a railway a certain sum, which included not only the purchase-money of the lands, but compensation for the consequential damage to the property of the landowner; the case not being one in which compensation was, under the act, a distinct subject of contract, but being merely an agreement by the landowner to accept a sum in full for the purchase and damage; the purchase being the substance of the agreement, and the damage an incident. (*Ib.*)

The fact that the railway company had, by the lapse of time, lost the powers which the legislature had given them to take lands, did not deprive them of the right to hold lands which they had acquired during the existence of their powers,

nor did it release them from the obligations which they had then contracted with reference to the purchase of land. (*Id.*)

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The agreement in this case was so framed as to render it doubtful whether it was not contingent on the formation of the railway: the Court of Appeal held this to be a case in which a decree for a specific performance would produce more injustice than justice, and therefore refused such decree. (S. C. 1 De G. M. & G. 521; 7 Railw. C. 9. See *Preston v. Lancashire Railw. Co.*, 1 Sim. N. S. 586.) The Court of Appeal afterwards said, in giving judgment in a case nearly *similar, that the ground on which they proceeded was this: —that, whether it was a contract or not, the circumstances of the case made it such that it was not fit for the Court of Chancery to interfere, by decreeing specific performance, because these two circumstances transpired—first, that complete relief might be obtained at law, if the parties were entitled to any relief; and, secondly, that the principle of mutuality wholly failed, for it was impossible for the company to hold the land for their own benefit in consideration of the money which they were to pay. (*Lord J. Stuart v. London and North Western Railw. Co.*, 7 Railw. C. 44; 1 De G. M. & G. 721.) Lord St. Leonards, C., said it appeared to him that the original decree in *Webb v. London and Portsmouth Railw. Co.*, ante, p. 405, was reversed upon the mutuality of the contract, and if it were reversed upon any grounds of supposed illegality, he should have had great difficulty in acceding to the doctrine, that a company entering into a contract could, upon any such grounds, get rid of the contract. (*Hawkes v. Eastern Counties Railw. Co.*, 7 Railw. C. 214.) See observations in pp. 217, 218, as to want of mutuality between the contracting parties.

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In a claim for the specific performance of an agreement by a railway company to purchase land from trustees, it was held that persons beneficially interested in the land were not necessary parties to the suit. (*Potts v. Thames Haven Dock and Railw. Co.*, 15 Jur. 1004.) By the terms of the agreement the land was to be valued, and the purchase-money was not to be less than 400*l.* It was questioned whether this

8 & 9 VICT. agreement could be enforced, no valuation having been made.
 c. 20. (Ib.) There had been great delay on the part of the com-
 Sect. 1. pany, owing to their pecuniary embarrassments, but, after
 considerable discussion, it was agreed to give the company
 further time, and the claim was ordered to stand over. (Ib.)

Parliamentary contract
 will bind rail-
 way com-
 pany.

Where parties are going before parliament for the purpose
 of being incorporated for private purposes, though, in some
 degree, for the benefit of the public, a door would be open to
 fraud if agreements made by their agents when they are act-
 ing in their individual capacities should not be binding on them
 when they have become a body corporate, and more espe-
 cially when they have obtained that character by means of
 those agreements. (*Edwards v. Grand Junction Railw.
 Co.*, 7 Sim. 342.) Where a person, acting on behalf of the
 subscribers to a railway, who were then soliciting a bill in
 parliament for the purpose of forming them into an incorpo-
 rated joint stock company, entered into a contract with the
 trustees of a road, whereby it was stipulated that, in consid-
 eration of the trustees withdrawing their opposition in parli-
 ament, and consenting to forego certain clauses, of which
 they had intended to press for the insertion in the act, a form-
 al instrument to the effect of the clauses should be executed
 under the seal of the company when incorporated; and the
 bill was accordingly allowed to pass unopposed and without
 the clauses: an injunction was granted at the suit of the
 trustees to prevent the company from violating the provisions
 contained in the omitted clauses. An agreement to withdraw
 or withhold opposition to a bill in parliament is not illegal;
 and a court of equity will enforce a contract founded on such
 a consideration. An incorporated company will be bound by
 the agreement of its individual members, acting before incor-
 poration on its behalf, if the company has received the full
 benefit of the consideration for which the agreement stipu-
 lated in its behalf. (*Edwards v. Grand Junction Railw.
 Co.*, 1 Myl. & Cr. 650; 7 Sim. 337; 1 Railw. C. 173. See
Doo v. London & Croydon Railw. Co., 1 Railw. C. 257;
 3 Jur. 258; *ante*, p. 249.)

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The lessees of premises, occupied by them as a ropery,

agreed to withdraw their opposition to a bill in parliament for making a railway which would intersect the ropery. The agreement, amongst other things, provided that the railway should be so constructed as that, when finished, the level of the ropery should not be altered, nor the surface of the ropery be in the least respect diminished. It was held that the railway company were bound to restore the surface so as to be available for all purposes to which it might have been applied before the construction of the railway, and not for the purposes of a ropery only. (*Harby v. East and West India Docks and Birmingham Junction Railw. Co.*, 1 De G. M. & G. 290.)

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c. 70.
Sect. 1.

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Where directors of a company granted a lease with a power of re-entry, and afterwards the company were incorporated by an act of parliament, which (amongst other things) enacted, "that all contracts, &c. theretofore entered into with the directors of the company shall be as valid and as effectual to all intents and purposes as if the company had been incorporated when the same contracts, &c. were entered into, and as if the same had been entered into with the incorporated company," it was held that the incorporated company might support ejectment on the clause of re-entry. (*Doe d. London Dock Co. v. Knebell*, 2 M. & Rob. 66.)

The B. and C. Railway Company agreed with the plaintiff to give him for fourteen acres of land 20,000*l.*, to be paid by instalments; other parties called the C. and B. Railway Company at the same time start a rival line, and both companies go to parliament. In committee it is agreed that the merits of both lines shall be referred to two members of the committee, and the solicitors for the rival companies at the same time sign an agreement, by which it is stipulated that the adopted company shall take the engagements with the landowners into which the rejected company may have entered; and to this agreement the sanction of two members of each company and also of the plaintiff is subsequently obtained, and is signified by a written memorandum of approval. The C. and B. company is adopted and is incorporated by act of parliament. Their line will require sixteen acres of

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the plaintiff's land in a different place. The plaintiff files a bill against the C. and B. company, stating these facts, and seeking to compel them to keep the agreement entered into by him with the B. and C. company, and *to restrain the C. and B. company from entering upon any lands belonging to him till after payment of the first instalment, which is already due, and from proceeding after subsequent instalments become due till such instalments shall have been paid. The defendants demurred generally to the bill. The demurrer was overruled, the court being of opinion that on the face of the bill there appeared such a case as would entitle the plaintiff to some relief, and that the meaning of the arrangement between the two companies was, that the plaintiff was to look to the performance of his contract to the existing company, instead of the rejected company. (*Stanley v. Chester and Birkenhead Railw. Co.*, 9 Sim. 264; 3 Myl. & Cr. 773; 1 Railw. C. 58.)

Reference to
the master as
to making ar-
rangements
with project-
ed railway
company.

Tenant for life of estates, the subject of a suit, having been served with a notice by a railway company of their intention to apply for an act to carry their railway through these estates, applied by petition for a reference to the master to inquire what proceedings should be taken, and whether it would be fit to make any and what arrangements, and that the petitioner might be at liberty to take such proceedings, and enter into such arrangements. The order was made as prayed, with liberty to the petitioners to proceed with evidence on the master making his report. (*Davis v. Combermere*, 3 Railw. C. 506; see 8 & 9 Vict. c. 18, s. 73, *ante*, p. 315.)

The guardian of an infant plaintiff, whose lands were intersected by railways and wagon-ways, from which he received a considerable rental, applied to certain companies to insert in the bills they were applying for in Parliament a clause to the effect that in case of their taking any part of the plaintiff's land they would compensate him for the loss or diminution in profit, consequent on the traffic being transferred from the plaintiff's railways and waggon-ways to those

of the company. The company having neglected to comply with this application, the plaintiff, by his guardian, presented a petition (in accordance with the finding of the master,) praying that he might be allowed to oppose the bill in Parliament, unless the insertion of such a clause as had been proposed to the company, or some other arrangement to be sanctioned by the master, should be agreed upon by them. The order was made as prayed. (*Monypenny v. Monypenny*, 4 Railw. C. 226.)

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c. 20.
Sect. 1.

A company associated for the formation of a railway were proposing to solicit a bill in Parliament. Some communication passed between their agents and the plaintiff as to the manner in which the railway was to interfere with a field and plantation belonging to him, situated near his mansion-house. The plaintiff, understanding that the railway would not pass through a certain part of his field and plantation, and that his field would not be taken for a *terminus* station, took no immediate steps for opposing the bill; but subsequently, in the absence of the plaintiff from England, his agent, in answer to a notice served on the plaintiff's land-steward, requiring the whole of the field for the purposes of the railway, returned a written dissent to the bill, and the plaintiff was treated as a dissenting landowner throughout the progress of the bill. The act having passed, the company, in the exercise of the powers thereby conferred, required of the plaintiff the whole of his field and plantation. It was held, that inasmuch as the plaintiff, in the communication between him and the company's agents, did not preclude himself from opposing the bill; and as he was, by the act of his agent, treated as a dissentient landowner, the company were not bound by any representation made by their agents for which they had received no consideration. (*Hargreaves v. Lancaster and Preston Railw. Co.*, 1 Railw. C. 416.)

Court will
not interfere
in absence of
parliamentary
contract.

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The trustees of a turnpike road agreed to assent to a bill in parliament for the formation of a railway on the condition that the railway should pass over the road at a sufficient

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elevation, and that the road should not be lowered or otherwise prejudiced. This qualified assent was returned in both Houses of Parliament: the bill passed. The twelfth section of the act, among other powers, authorized the company to raise and sink rivers or streams, roads or ways, in order the more conveniently to carry the same over or under or by the side of the railway, provided that the company should not divert obstruct, or impound any river or water to the prejudice of any mill or manufactory. The 72^d section enacted that the arch of any bridge for carrying the railway over or across any turnpike road should be of a height from the surface of such road to the centre of such arch of not less than sixteen feet provided that the descent under any such bridge should not exceed one foot in thirty feet. The act contained no particular proviso as to the road in question. It was held by Shadwell, V. C., that the modified assent of the road trustees, the terms of which were neither embodied in any agreement between the trustees and the company, nor adopted by the legislature, afforded no equitable ground for restraining the company from enforcing, with regard to the road in question, all the powers conferred by the act. That the company were authorized to sink the original surface of a turnpike road, in order to give the specified elevation to the arch of a bridge erected for carrying the railway over such road, notwithstanding that the effect, from the peculiar situation of the road, would be to render it liable to be occasionally flooded. (*Aldred and others v. North Midland Railw. Co.*, 1 Railw. C. 404; 3 Jur. 244; see *Provost and Eton College v. Great Western Railway Co.*, 1 Railw. C. 200).

The ground on which the court interferes in these cases is, that there is a parliamentary contract, but if no such contract exists the court cannot interfere by injunction. A bill for incorporating a company for the formation of a railway was pending in the House of Lords. In consequence of a petition presented by Eton College against the bill,

the following clauses were introduced: Section 99 enacting, that it should not be lawful for the company to alter or *divert any part of the line of railway as then laid down, nor to make any other railway, tramroad or other road or way to the south of the line, within three miles of Eton. Section 100 enacting, that it should not be lawful for any company or person to form, make or lay down any branch railway or tramroad, or other road or way whatever, passing or approaching within the same limits. Section 101 enacting, that no depot, station, yard, wharf, waiting, watering, loading or unloading place should be made within the same distance. Sections 102 and 103 enacting, that the company should erect and maintain a fence on each side of the railway within certain parishes for a distance of four miles, and should maintain a police for preventing all access to the railway by the scholars of Eton. Eton College, continued their opposition until the bill, including the said clauses, passed into an act. The company diverted an existing road within the prescribed distance, and fenced off and appropriated part of the site of such former road as a passage communicating with the railway, by which passengers were invited to pass on foot to and from, and to be taken up and set down by the trains stopping at the end of such passage. They also hired two rooms in a public-house erected at the entrance of such passage, and the same were used as a booking office and waiting place, in the same manner as the station houses of the company were used. It was held by Shadwell, V. C. that the act did not prohibit the company from taking up and setting down passengers at that place. It was held by Lord Cottenham that in this case, there being nothing of a parliamentary contract between the parties, the company were entitled to exercise the powers given by the act in any manner not therein prohibited. That the passage in question was not a road within the meaning of the 100th section. That the house in question was not a station or waiting place within the meaning of the 101st section. (*The Provost and Eton College v. Great Western Railw. Co.*, 1

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Railw. C. 200; 3 Jur. 163.) Lord Cottenham, C. said, in this case it is very important to observe that there is nothing of contract between the parties. If upon the proposals the college had retired from the contest and had acquiesced in the provision of these clauses, supposing that they would effect their purpose, it might have been a subject for consideration, whether these acts were not an evasion of the contract, which in that case would appear to exist between the college and the company,—such is not the case; both parties were entirely at arms-length. The company have a right to exercise every power which is given to them by the act in any manner not prohibited by the act, and Eton College cannot restrain them from doing anything, unless they can show that the company are acting contrary to the provisions of the act. His lordship could not say any of the acts brought before him in evidence were of a nature prohibited by the act, and therefore he refused the motion for an injunction, with costs. (*The Provost and Eton College v. Great Western Railw. Co.*, 1 Railw. C. 200; see *Lord Petre v. Eastern Counties Railw. Co.*, 3 Railw. C. 267, *post*).

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*A railway company, who had projected and were promoting a new line of railway, being opposed by a landowner on the line, arranged through a third party, who professed to be the agent of the company, to purchase his land at a certain price. The landowner accordingly withdrew his opposition, and the bill passed authorizing the construction of the new line. No steps however, were taken to carry out the scheme, and the compulsory powers having expired, though the time for completing the line had not, the landowner filed his bill against the company for specific performance of the contract to purchase his land. It was held that there was no contract between the plaintiff and the company, for before they obtained their new act they could not enter into a contract; and as to the adoption of the contract made by their professed agent for their benefit as a corporation subsequently established, there had been nothing done after obtaining the act which the plaintiff's withdrawal of opposition had enabled them to do; and

therefore, they could not be said to have adopted it. (*Good- 8 & 9 Vict.*
ay v. Colchester and Stour Valley Railw. Co., 19 Law T. c. 29
 335.) Sect. 1.

A court of equity has jurisdiction, if a proper case connected with private property or interest be made, to restrain a party by injunction from petitioning against a bill in parliament. Injunction as
to proceed-
ings in par-
liament.

The Stockton Railway Company being leased to the Clarence Company, entered into an agreement for the sale of their railway to the Leeds Company; and it was a term of the agreement that the purchase should be completed three weeks after an act had passed for permitting the Leeds to amalgamate with the Clarence Railway Company. It did not appear that any definite agreement was concluded between the Clarence and the Leeds Company, but it was understood that a bill should be presented by the Clarence Company for the amalgamation of the two companies. The bill was presented, and passed the Commons without opposition; but in the Lords, the Leeds Company presented a petition against the bill. The Stockton Company, fearing that if this act did not pass, they would lose the benefit of their contract, filed a bill against the two other companies, praying an injunction to restrain the Leeds Company from opposing the bill in parliament, and also specific performance of the agreement: it was held, by Lord Cottenham, C., discharging the order of *Shadwell V. C.*, granting the injunction, that the Stockton Company had not made out such a case as to induce a court of equity to exercise its jurisdiction by injunction. (*Stockton and Hartlepool Railw. Co. v. Leeds and Thirsk and the Clarence Railw. Co.*, 5 Railw. C. 690; 2 Phill. C. C. 663.) A party agreed with a railway company to withdraw his opposition to their bill in parliament, in consideration of their completing the line of a railway in a particular manner. The company subsequently found themselves unable to carry their contract into execution, and gave notice of their intention to apply to parliament for an act to authorize them to abandon their scheme. Lord Cottenham, C., dissolved an *injunction granted by *Shadwell, V. C.*, at the suit of the party with whom the company had contracted, restraining the company from mak-

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8 & 9 VICT. c. 20. ing this application. (*Heathcote v. North Staffordshire Railw. Co.*, 2 Mac. & G. 100; 2 Hall & T. 332; 14 Jur. 859; 6 Railw. C. 358.)
 Sect. 1.

[412] The Oxford Railway Company, previously to obtaining their act, entered into a provisional agreement with the Great Western Railway Company, under which it was agreed (among other things) that that company should assist the Oxford Company in obtaining an act; and that such act should contain a power to lease their proposed line to the Great Western Railway Company. The act passed, containing powers to lease and sell the new line to the Great Western Railway Company; and under it, the Railway was to be made, in all respects, to the satisfaction of the engineer of that company, and to be formed of such gauge as to admit of its being worked continuously with the Great Western line. No agreement was finally concluded between the companies; but, pending negotiations, some of the directors of the new company entered into an agreement with the London and North Western Railway Company (which received the sanction of the majority of the shareholders, and was executed under the corporate seals of both companies), a term in which was as follows:—"The whole concern, without incumbrance, when completed, to be worked by the London and North Western and Midland Counties Railway Companies, who shall have perfect control and exercise all the rights of the Oxford Railway Company;" and another term was, that the Oxford Railway was to be completed as a narrow gauge double line between certain places therein specified. Some of the shareholders of the Oxford Railway Company being dissatisfied with the agreement entered into with the London and North Western Railway Company, filed a bill to restrain that company, by injunction, from acting under that agreement, or using the funds of the company in applying to parliament to sanction it: it was held, that the Oxford Railway Company be enjoined from carrying into effect so much of the agreement as bound them to lay down any part of the line on the narrow gauge: it was also held, that the Court of Chancery will interfere by injunction, to restrain

companies from applying any portion of their funds in a way not authorized by their act. That although the Oxford Railway was to be made so as to be traversed continuously by the Great Western Railway Company, the Oxford Railway Company were not thereby prevented from making a line of a mixed gauge or narrow gauge beside it independently; but that they could not do so under the terms of an illegal agreement. That an agreement by one company to delegate its powers to another company is illegal. That one dissentient shareholder may file a bill to restrain an illegal proceeding by the company, although such proceeding may have been sanctioned by a large majority of the shareholders. (*Beman v. Rufford*, 7 Railw. C. 48; 1 Sim. N. S. 550; *ante*, p. 171.)

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Sect. 2.

**Definition of Words.*

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And with respect to the construction of this act and of other acts to be incorporated therewith, be it enacted as follows: Interpretations in this act.

II. The expression "the special act," used in this act, shall be construed to mean any act which shall be hereafter passed authorizing the construction of a railway, and with which this act shall be so incorporated as aforesaid; and the word "prescribed," used in this act in reference to any matter herein stated, shall be construed to refer to such matter as the same shall be prescribed or provided for in the special act, and the sentence in which such word shall occur shall be construed as if, instead of the word "prescribed," the expression "prescribed for that purpose in the special act" had been used; and the expression "the lands" shall mean the lands which shall by the special act be authorized to be taken or used for the purposes thereof; and the expression "the undertaking" shall mean the railway and works of whatever description, by the special act authorized to be executed.

"Special act."

"Prescribed."

"The lands."

"The undertaking."

III The following words and expressions both in this and the special act shall have the meanings hereby assigned to them, unless there be something either in the subject or context repugnant to such construction; (that is to say,)

Interpretations in this and the special act:

Words importing the singular number only shall include Number.

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c. 2)

Sect. 3.

Gender.

the plural number, and words importing the plural number only shall include also the singular number :

Words importing the masculine gender only shall include females :

"Lands."

The word "lands" shall include messuages, lands, tenements, and hereditaments of any tenure :

"Lease."

The word "lease" shall include an agreement for a lease :

"Toll"

The word "toll" shall include any rate or charge or other payment payable under the special act for any passenger, or animal, carriage, goods, merchandize, articles, matters, or thing conveyed on the railway :

"Goods."

The word "goods" shall include things of every kind conveyed upon the railway :

"Month."

The word "month" shall mean calendar month :

"Superior
courts"

[*114]

The expression "superior court" shall mean her majesty's superior courts of record at Westminster or Dublin, as the case may require :

"Oath."

The word "oath" shall include affirmation in the case of Quakers, or other declaration lawfully substituted for an oath in the case of any other persons exempted by law from the necessity of taking an oath :

"County."

The word "county" shall include any riding or other like division of a county, and shall also include county of a city or a county of a town (b).

"The sheriff"

The word "sheriff" shall include undersheriff, or other legally competent deputy ; and where any matter in relation to any lands is required to be done by any sheriff or clerk of the peace, the expression "the sheriff," or the expression "the clerk of the peace," shall in such case be construed to mean the sheriff or the clerk of the peace of the county, city, borough, liberty, cinque port, or place where such lands shall be situate ; and if the lands in question, being the property of one and the same party, be situate not wholly in one county, city, borough, liberty, cinque port, or place, the same expression shall be construed to mean the sheriff or clerk of the peace of any county, city, borough, liberty, cinque port, or place where any part of such lands shall be situate (c) :

"The clerk
of the peace."

"Justice."

The word "justice" shall mean justice of the peace acting for the county, city, borough, liberty, cinque port, or place where the matter requiring the cognizance of any such justice shall arise, and who shall not be interested

in the matter ; and where such matter shall arise in respect of lands being the property of one and the same party situate not wholly in any one county, city, borough, liberty, cinque port or place (*d*), shall mean a justice acting for the county, city, borough, liberty, cinque port, or place where any part of such lands shall be situate, and who shall not be interested in such matter ; and where any matter shall be authorized or required to be done by "two justices," the expression "two justices" shall be understood to mean two justices assembled and acting together (*e*):

8 & 9 Vict.
c. 21.

"Two justices."

"Owner."

Where under the provisions of this or the special act any notice shall be required to be given to the owner of any lands, or where any act shall be authorized or required to be done with the consent of any such owner, the word "owner" shall be understood to mean any person or corporation who, under the provisions of this or the special act, or any act incorporated therewith, would be enabled to sell and convey lands to the company (*f*):

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The expression "the company" shall mean the company or party which shall be authorized by the special act to construct the railway:

"The company."

The expression "the railway" shall mean the railway and works by the special act authorized to be constructed (*g*):

"The railway."

The expression "the board of trade" shall mean the lords of the committee of her majesty's privy council appointed for trade and foreign plantations:

"Board of Trade."

The expression "the bank" shall mean the Bank of England where the same shall relate to monies to be paid or deposited in respect of lands situate in England, and shall mean the Bank of Ireland where the same shall relate to monies to be paid or deposited in respect of lands situate in Ireland (*h*).

"The bank."

The expression "turnpike road" shall, when applied to any road in Ireland, include any road upon which her majesty's mails are or shall be carried in mail carriages ; or such other roads as the commissioners of public works in Ireland shall consider to require arches of greater width or height than by this act is required for public carriage roads:

"Turnpike road," Ireland.

The expression "surveyor," applied to a road or highway, Ireland.

"Surveyor,"

8 & 9 Vict.
c. 20.

Sect. 4.
"Overseers
of the poor,"
Ireland.

shall, as to railways in Ireland, include the county surveyor:

The expression "overseers of the poor," when applied to Ireland, shall include the poor law guardians of the electoral division and the clerk of the guardians of the union through which such railway may pass.

(b) These terms are to receive the same construction in 8 & 9 Vict. c. 16, s. 3, p. 83, and 8 & 9 Vict. c. 18, s. 3, p. 201.

(c) The words "sheriff," "the clerk of the peace," "justice," "two justices," and "owner," are to have the same meaning in 8 & 9 Vict. c. 18, s. 3; *ante*, p. 223.

(d) It seems that the words "the same" are here omitted.

(e) *Ante*, p. 84, n. (f).

[*416] (f) Under these words a railway company have a right, *by the compulsory powers of their act, to take a piece of land for building a station. See ss. 16, 45, *post*; *Cotter v. Midland Railw. Co.*, 2 Phill. C. C. 469; *post*, p. 431.

(g) The word "bank," is to mean the same in 8 & 9 Vict. c. 18, s. 3; *ante*, p. 223.

Short title of
the act.

IV. That in citing this act in other acts of parliament and in legal instruments, it shall be sufficient to use the expression "The Railways Clauses Consolidation Act, 1845 (h)."

(h) See 8 & 9 Vict. c. 18, s. 4, n. (h), *ante*, p. 224.

Partial Incorporation with other Acts.

Form in
which por-
tions of this
act may be
incorporated
in other acts.

V. And whereas it may be convenient in some cases to incorporate with acts hereafter to be passed some portion only of the provisions of this act; be it therefore enacted, that for the purpose of making any such incorporation, it shall be sufficient in any such act to enact that the clauses of this act with respect to the matter so proposed to be incorporated (describing such matter as it is described in this act in the words introductory to the enactment with respect to such matter), shall be incorporated with such act; and thereupon

all the clauses and provisions of this act with respect to the matter so incorporated shall, save so far as they shall be expressly varied or excepted by such act, form part of such act, and such act shall be construed as if the substance of such clauses and provisions were set forth therein with reference to the matter to which such act shall relate.

8 & 9 Vict.
c. 20.
Sect. 6.

Construction of Railway.

And with respect to the construction of the railway and the works connected therewith, be it enacted as follows (*i*).

VI. In exercising the power given to the company by the special act to construct the railway, and to take lands for that purpose, the company shall be subject to the provisions and restrictions contained in this act, and the said Lands Clauses Consolidation Act; and the company shall make to the owners and occupiers of and all other parties interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers and other parties by reason of the exercise *as regards such lands, of the powers by this or the special act, or any act incorporated therewith, vested in the company; and, except where otherwise provided by this or the special act, the amount of such compensation shall be ascertained and determined in the manner provided by the said Lands Clauses Consolidation Act for determining questions of compensation with regard to lands purchased or taken under the provisions thereof; and all the provisions of the said last-mentioned act shall be applicable to determining the amount of any such compensation, and to enforcing the payment or other satisfaction thereof.

The construction of the railway to be subject to the provisions of this act and the Lands Clauses Consolidation Act.

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(*i*) Money in exchequer bills may be advanced by the commissioners of the treasury to corporations, or any company of proprietors of public works carried on under the authority of parliament, or for the encouragement of any trustees or trustee of roads or *railways*, subject to the conditions of the several acts authorizing the issuing of exchequer

8 & 9 Vict. bills for public works. (3 & 4 Vict. c. 10, s. 15. See 5 & 6 Vict. c. 9.)

Sect. 20
Expenses of appointing special constables. Whenever the appointment of special constables (see 1 & 2 Will. 4, c. 41; 5 & 6 Will. 4, c. 43) has been occasioned by the unlawful behavior of persons employed on railroads and other public works, the expenses thereof may be ordered by two justices to be paid by the treasurer or other officer having the control of the funds of the company making the railroad. (1 & 2 Vict. c. 80, s. 1.) The secretary of state may reduce excessive orders. (*Ib.* s. 2.) The amount ordered and allowed by the secretary of state may be recovered by distress if not paid during three weeks after demand (*Ib.* s. 3.)

Exemption of London and Birmingham Railway from Metropolitan Building Act. The buildings erected or to be erected by the London and Birmingham Railway Company incorporated by acts 3 & 4 Will. 4, c. xxxvi, and 5 & 6 Will. 4, c. lvi. s. 126, within and in connection with the works of their railway, by virtue of the several acts relating thereto, are exempted from the supervision of the official referees appointed by virtue of the Metropolitan Building Act, 7 & 8 Vict. c. 84, Sched. (B.) part II.

Appointment of additional constables for keeping peace near railways in Ireland. The lord lieutenant of Ireland, upon the application of the railway or other company or of two justices of the peace of the county, acting in the district in which the railway, &c. shall be in progress of construction, may appoint head and other constables in addition to those authorized to be appointed by 6 & 7 Will. 4, c. 13, for keeping the peace near the works of any railway and similar works in Ireland. (8 & 9 Vict. c. 46, s. 1.)

The expense of the additional head and other constables is to be paid by the company or parties carrying on such works, 8 & 9 Vict. c. 46, s. 2. If the company or parties neglect to pay the expense, it may be recovered at the suit of her majesty's attorney-general for Ireland, or by distress and sale of the goods of the company. (*Ib.* s. 3. See *North British Railw. Co. v. Horne*, 5 Railw. C. 231, *ante*, p. 24) in the case of damage to a party whose lands are not entered

upon, but are injuriously affected by the exercise of the powers of a railway company upon their own lands, or upon the lands of another party, and for which damage, compensation is required to be made by this section; it is not unlawful for the company to execute the works which occasion the damage, before the amount of compensation for the same is ascertained paid or deposited. (*Hutton v. London and South Western Railw. Co.*, 7 Hare, 259; 13 Jur. 486; 18 L. J. Ch. 345.)

8 & 9 VICT.
c. 20.
Sect. 6.

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It seems to be the duty of a railway company, as to all those things which depends upon agreements with individuals to settle these agreements before they begin to cut on any part of their line. The plaintiffs were the owners of very extensive mills and other factories necessary for carrying on their business of cotton spinners, and also were possessed of all the lands adjacent thereto, and lying within the limits of deviation required by a railway company, for the formation of their proposed line. The plaintiffs, apprehending that, if the intended railway should be made in the manner proposed their property would be materially injured, presented their petition, and opposed the bill in committee. The committee, having refused to proceed unless some compromise were entered into by the company with the plaintiffs, the following clause was agreed upon:—"Whereas John Gray and William Gray are the owners and occupiers of certain mills, lands and buildings, situate at Darcy Lever, through which the lines of the railway, as delineated on the plans and sections before referred to, passes, be it enacted, that, it shall not be lawful for the said company, without the consent of the said John Gray and William Gray, or the owners or owner for the time being of the said mills, lands and buildings, to construct the said railway nearer to the same mills, lands and buildings, or any of them, than the south-east end of Lever Bridge, delineated on the said plans, and therein numbered (1)." Upon the insertion of this clause, the plaintiffs withdrew their opposition, and the bill passed into an act. The company having given notice to the plaintiffs that they intend-

Injunction
granted until
agreement
with land-
owners.

8 & 9 VICT.
c. 20.

Sect. 6.

ed to proceed in the formation of their railway through their property, but in a different line to that originally proposed, the plaintiffs filed their bill, and moved for an injunction :— it was held, by Lord *Langdale*, M. R., that on the construction of the clause, the company had no right to make the railway through the plaintiff's lands, until they had entered into an agreement with them, and that they were entitled to an injunction, which was accordingly granted. Lord *Cottenham*, C., held, on appeal, that, as the question involved a question of law, and the defendants required it, the court was not justified in deciding the right to a perpetual injunction, without giving them an opportunity of having the opinion of a court of law. That the motion should stand over, and the injunction in the meantime be continued, the *plaintiffs undertaking to proceed immediately to the trial of the legal question. (*Gray v. Liverpool and Bury Railw. Co.*, 4 Railw. C. 235 ; 9 Beav. 391).

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Interference
with right of
way.

In an action on the case for the obstruction of a right of way as appurtenant to the messuage and dwelling-house of the plaintiff, by means whereof, as alleged in the second count of the declaration, the plaintiff could not have or enjoy his said way as he of right ought to have done, and otherwise might and would have done, and had been and was deprived of the use, benefit, and advantage of the same, to his damage—the plea justifying the obstruction complained of, for the purpose of making and constructing a railway under the powers and provisions in the Great Northern Railway Act, 1846, by which the defendants were incorporated, and in the acts therewith incorporated. The replication was that the way was a road within the meaning of this act ; that the defendants had rendered it impassable, and thereby interfered with the same, within the meaning of this act ; and that the defendants had not caused a sufficient road to be made, instead of the road so interfered with :—it was held, on demurrer, that by this and the 55th sections of this act the remedy by action for an interference with a private right of way was taken away, except where special damage

had been suffered, and therefore that the second count was bad. (*Watkins v. Great Northern Railw. Co.*, 20 L. J., Q. B., 391; 15 Jur. 127.)

8 & 9 VICT.
c. 20.
Sect. 7.

VII. If any omission, misstatement or erroneous description shall have been made of any lands, or of the owners, lessees or occupiers of any lands, described on the plans or books of reference mentioned in the special act, or in the schedule to the special act, it shall be lawful for the company, after giving ten days notice to the owners of the lands affected by such proposed correction, to apply to two justices for the correction thereof (*k*); and if it shall appear to such justices that such omission, misstatement or erroneous description arose from mistake, they shall certify the same accordingly, and they shall in such certificate state the particulars of any such omission, and in what respect any such matter shall have been misstated or erroneously described; and such certificate shall be deposited with the clerks of the peace of the several counties in which the lands affected thereby shall be situate, and shall also be deposited with the parish clerks of the several parishes in England, and with the post masters of the post towns in or nearest to such parishes in Ireland, in which the lands affected thereby shall be situate; and such certificate shall be kept by such clerks of the peace, parish clerks and postmasters respectively along with the *other documents to which they relate; and thereupon such plan, book of reference or schedule shall be deemed to be corrected according to such certificate; and it shall be lawful for the company to make the works in accordance with such certificate.

Errors and omission in plans to be corrected.

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(*k*) See *Taylor v. Clemson*, 3 Railw. C. 90; 2 Q. B. R. 978; 8 Jur. 833, H. L.; 11 Cl. & F. 610; *ante*, p. 234.

VIII. It shall not be lawful for the company to proceed in the execution of the railway unless they shall have previously to the commencement of such work deposited with the clerks of the peace of the several counties in or through which the railway is intended to pass a plan and section of all such alterations from the original plans and sections as shall have been approved of by parliament, on the same scale

Works not to be proceeded with until plans of all alterations authorized by parliament have been deposited.

8 & 9 VICT.
c. 20
Sect. 9. and containing the same particulars as the original plan and section of the railway, and shall also have deposited with the clerks of the several parishes in England, and the postmasters of the post towns in or nearest such parishes in Ireland, in or through which such alterations shall have been authorized to be made, copies or extracts of or from such plans and sections as shall relate to such parishes respectively.

Clerks of the peace, &c. to receive plans of alterations and allow inspection. IX. The said clerks of the peace, parish clerks and postmasters shall receive the said plans and sections of alterations, and copies and extracts thereof respectively, and shall retain the same, as well as the said original plans and sections, and shall permit all persons interested to inspect any of the documents aforesaid, and to make copies and extracts of and from the same, in the like manner, and upon the like terms, and under the like penalty for default, as is provided in the case of the original plans and sections by an act passed in the first year of the reign of her present majesty, entitled 7 Will. 4 & 1 Vict. c. 83. "An Act to compel Clerks of the Peace for Counties and other Persons to take the Custody of such Documents as shall be directed to be deposited with them under the Standing Orders of either House of Parliament (l).

(l) 8 & 9 Vict. c. 16, s, 161, *ante*, p. 219, n. (k.)

Copies of plans, &c. to be evidence. X. True copies of the said plans and books of reference, or of any alteration or correction thereof, or extracts therefrom, certified by any such clerk of the peace, which certificate such clerk of the peace *shall give to all parties interested, when required, shall be received in all courts of justice or elsewhere as evidence of the contents thereof.

[*421]

Limiting deviation from datum line described on sections, &c. XI. In making the railway it shall not be lawful for the company to deviate from the levels of the railway, as referred to the common datum line described in the section approved of by parliament, and as marked on the same, to any extent exceeding in any place five feet, or, in passing through a town (m), village, street, or land continuously built upon, two feet, without the previous consent in writing of the owners and occupiers of the land in which such deviation is intended to be made; or in case any street or public highway shall be affected by such deviation, then the same shall not be made without the like consent of the trustees or commissioners having the control of such street or public highway,

or if there be no such trustees or commissioners, without the like consent of two or more justices of the peace in petty sessions assembled for that purpose, and acting for the district in which such street or public highway may be situated or without the like consent of the commissioners for any public sewers, or the proprietors of any canal, navigation, gas works or waterworks affected by such deviation: provided always, that it shall be lawful for the company to deviate from the said levels to a further extent without such consent as aforesaid, by lowering solid embankments or viaducts provided that the requisite height of headway as prescribed by act of parliament be left for roads, streets or canals passing under the same: provided also, that notice of every petty sessions to be holden for the purpose of obtaining such consent of two justices as is hereinbefore required shall, fourteen days previous to the holding of such petty sessions, be given in some newspaper circulating in the county, and also be affixed upon the door of the parish church in which such deviation or alteration is intended to be made, or if their be no church, some other place to which notices are usually affixed (n).

8 & 9 Vict.
c. 20.
Sect. 11.

Proviso.

Proviso.

(m) On the trial of an issue whether a railway was passing through a "town" within the meaning of this section, the judge merely told the jury that the word "town," was to be understood in its ordinary and popular sense: it was held a misdirection, inasmuch as the judge ought to have given such a definition to the word "town," as would have enabled the jury to decide the issue. Town, in this act, means a collection of inhabited houses, so near to each other *that they may reasonably be said to be continuous; and the term will include a space of open ground, surrounded by continuous houses; and it seems to include all open spaces occupied as mere accessories to such houses, although not so surrounded. (*Elliot v. South Devon Railw. Co.*, 2 Exch. R. 725; 5 Railw. C. 500. See *Reg. v. Cottle*, 16 Q. B. 412.)

Meaning of
word town
in this section.

[*422]

(n) Notices given and plans and sections of an intended railway deposited, in pursuance of the standing orders of the Houses of Parliament, previous to an application for an act

Plans and
sections of
intended
railway.

8 & 9 VICT.
c. 20.

Secs 11.

[422]

are not to be regarded in construing that act afterwards, unless they are so referred to as to be incorporated therewith. A vertical deviation of the level of a railway, not exceeding five feet, calculated with reference to the *datum* line shown on the plans and sections deposited in pursuance of the standing orders of the House of Parliament, is within the powers of deviation conferred by the Railways Clauses Consolidation Act for Scotland (8 & 9 Vict. c. 33, s. 11, which corresponds with this section), although the deviation may exceed five feet, calculated with reference to the *surface* lines shown on the said plans and sections. (*North British Railw. Co. v. Tod*, 12 Cl. & Fin. 722; 10 Jur. 975. See *Braynton v. London and North Western Railw. Co.* 4 Railw. C. 563; 10 Beav. 238; *Beardmer v. London and North Western Railw. Co.*, 1 Mac. & G. 112; 1 Hall & T. 161; 13 Jur. 327; 18 Law. J. Ch. 432.) The plaintiff was the owner of a house near a public road, and connected therewith by an avenue and a lodge. A railway company deposited plans, &c. whereby it was shown that they intended to cross the plaintiff's avenue 520 feet from the lodge, under a bridge, raising the level of the roadway of the avenue only two feet and by means of a cutting 15 feet in depth. The plaintiff, relying on the plans and sections, did not oppose the bill in parliament, which accordingly passed into an act. The railway company afterwards gave notice of their intention to deviate from the original plans, and to make their cuttings 61 feet nearer the plaintiff's house, and to make a bridge over his avenue 17 feet high. On appeal from the Court of Session in Scotland, an application by the plaintiff for an interdict to prevent the company from crossing the plaintiff's avenue in another manner than that shown by the original plans was refused, notwithstanding it was shown that the measurements in the original plans had been miscalculated with reference to the datum line, and that the defendant's cuttings would, according to those plans, exceed the vertical powers of deviations given to the railway company: it was held, that parties are bound by what is represented on the deposited plans and sections, so far only as

such plans and sections are incorporated in, or specially referred to by the act. That the court will not regard what is done under the standing orders of the House, but will only look at the act itself. That the plans are binding to determine the level of the railway with reference to the datum line, but not to the surface level of the land over or through which the railway passes. (*North British Railw. Co. v. Tod*, 4 Railw. C. 449; 10 Jur. 975, 12 Cl. & Finn. 722.) [*423]

The plaintiff, the owner of a piece of land through which a railway company, by their plans and sections, represented they intended to pass an embankment, so as to cross a public road on the level, filed a bill, and obtained an *ex parte* injunction to restrain the company from lowering or excavating the road, or affecting the plaintiff's land, in any manner inconsistent with the provisions of their act or the deposited plans or sections, or an agreement entered into by the plaintiff with the company. The Lands Clauses Consolidation Act having been incorporated with the special act, and the agreement referring to the latter act: it was held, that the company were entitled to exercise all the powers given by the general and special act, although the plaintiff's bill and affidavits stated that the agreement was entered into on the understanding that the line would be made according to the plans and sections. Lord *Langdale*, M. R., did not think it perfectly clear that a company having a power given to it mainly for the public good, but which may effect an injury on an individual in respect of which compensation can be given (which case his lordship desired always to distinguish from injury for which there can be no compensation) has a right to contract itself out of those powers. His lordship had never felt the least disposition to extend the powers of railway companies, and he believed it would be greatly for their and the public advantage, if those powers were less than they seem to be; but if they had those powers given them for the public benefit, such, for instance, as to make a road under instead of across, a railway, he did not think they have the right or the power to contract themselves out of it with any individual whatever. (*Braynton v. London and*

8 & 9 Vict.

c. 20.

Sect. 11.

8 & 9 VICT. *North Western Railw. Co.*, 4 Railw. C. 563, 10 Beav.
 c. 20. 238.)

Sect. 11.

A railway company, before applying for a Deviation Act, deposited with the clerk of the peace for the county, plans and sections of the proposed line, and cross sections, showing the manner in which roads were to be carried over the line. One of these cross sections delineated the manner in which it was proposed to carry a road at I. over the line by a bridge and the proposed inclination of the altered line of road. The Deviation Act was incorporated with this act, and authorized the company to construct the bridges for carrying the railway thereby authorized over any roads, or for carrying any roads over the said railway, of the heights and spans, and in the manner shown on the sections deposited. The company made the line, and at I. deviated two feet vertically from the level marked on the plans. They carried the road over the line on a bridge of the proposed height and span, but with a different inclination of the altered road. A mandamus having commanded the company to make the bridge, and carry the road over it in conformity with the cross section, and at the rates of inclination delineated thereon, as the rates of inclination of the road when altered, it was held, on demurrer to a plea to the return, that the mere exhibition of plans and sections whilst a bill is depending *in parliament, does not make them

[*424] obligatory on the promoters after the act has passed, unless there be something in the special act when passed, or in the general acts with which it is incorporated, which requires that the plans should be followed. The exhibition of plans and sections before the act is passed, is analogous to parol negotiations and proposals preliminary to the making of the private agreement, which is afterwards reduced into writing; such proposals do not bind the parties, except in so far as they are in writing. (*Reg. v. Caledonian Railw. Co.*, 16 Q. B. 30; 15 Jur. 396; 20 Law J. Q. B. 147.)

By an act of parliament, authorizing an extension of a line of railway, and the construction of a station which act incorporated the Lands Clauses Consolidation Act and this act, it was enacted, that subject to the powers of deviation in this act

contained, it shall be lawful for the said company to make and maintain the said extension and the said station, and the works connected therewith, in the lines, &c., and upon the lands delineated upon the said plans, &c., and to enter upon, take and use such of the said lands as shall be necessary for the purpose. The plaintiff's lands were delineated upon the plans, and marked 1 and 4, and the line of deviation passed through both lots. The company required the entire lots of 1 and 4 for the purpose of extension and the station. It was held, dissolving an injunction obtained by the plaintiff, that the company were empowered to take all or any part of the lands delineated on the plans, although beyond the line of deviation and although they were not so entitled under the powers of deviation contained in the Railways Clauses Consolidation Act. His honor thought that, inasmuch as the plans showed where the stations should be made, it was the intention of the legislature to empower the company to make it on the whole of the land without attention to the limits of deviation at all. (*Crawford v. Chester and Holyhead Railw. Co.*, 11 Jur. 917.)

8 & 9 Vict.

20

Sect. 11.

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A company were empowered by act of parliament to take lands for the formation of a railway, and to deviate to the extent of one hundred yards from the line laid down in their map, provided such deviation was made within two years from the passing of the act, and which two years would expire on the 4th of July, 1838. In January, 1837, a deviation in the line within the prescribed limits was made. A subsequent act passed in May, 1837, and enacted that the time by the first act limited for the compulsory purchase of lands should be enlarged to the term of one year, but provided that no deviation from the line laid down should be made after the expiration of the period by the first act limited. The railway company having subsequently to the 4th of July, 1838, given notice to certain owners of lands on the line to which they had deviated in January, 1837, of their intention to take the lands under the powers given by the acts, on a motion for an injunction to restrain the railway company from so proceeding to obtain possession, on the ground that the company,

Deviations
from prescrib-
ed line.

8 & 9 Vict.
c. 20.

Sect. 11.

[*425]

having allowed the time limited by the first act to expire, had no power to take the lands by *compulsory process, it was held by *Shadwell, V. C.*, that the plaintiffs not having shown that irreparable mischief would result from the proceedings of the company, an injunction could not be granted. It was held by Lord *Cottenham, C.*, that where it is clearly shown that a public company is exceeding its powers, the Court of Chancery cannot refuse to interfere by injunction; that the company having previous to the expiration of the two years limited by the first act, and previous also to the passing of the second act, deviated within the authorized limits from the line laid down in the map, the second act must be construed to give them an enlarged period of one year in which to exercise the power of taking the land in the line to which they had so deviated. (*River Dun Navigation Co. v. North Midland Railw. Co.*, 1 Railw. C. 135.)

By the Bristol and Exeter Railway Act (6 & 7 Will 4, c. xxxvi. s. 57), the lands to be taken for the line of the railway were not to exceed 22 yards in breadth, except in places required (*inter alia*) for embankments and cuttings; and sect. 59, which gave the power to deviate in the line and section, limited the deviation from the line delineated on the plan deposited with the clerk of the peace to 100 yards, and provides that it shall not *extend into the lands* of any person not mentioned in the book of reference, unless omitted by mistake, and so certified: it was held, that the same powers were incidental to the deviated as to the original line, and that therefore the company were not limited to 100 yards in those places in the deviation required for embankments and cuttings, but only in the actual line of the railway; and that it was not competent to C. H. P. to object that lands of K., not mentioned in the book of reference, were taken for such purpose; and that the line or center, from which measurements are to be made, is the *medium filum* (middle line) of the twenty-two yards of lands to be taken, and not of the space between the two rails. (*Doe d. Payne v. Bristol and Exeter Railw. Co.*, 2 Railw. C. 75; 6 Mee. & W. 320. See *Reg. v. Eastern Counties*

Railw. Co., 2 P. & D. 648; 1 *Railw. C.* 509; 2 *Railw. C.* 8 & 9 VICT.
260.) c. 20.

Sect. 12.

XII. Before it shall be lawful for the company to make any greater deviation from the level than five feet, or in any town, village, street, or land continuously built upon, two feet, after having obtained such consent as aforesaid, it shall be incumbent on the company to give notice of such intended deviation by public advertisement, inserted once at least in two newspapers, or twice at least in one newspaper, circulating in the district or neighborhood where such deviation is intended to be made, three weeks at least before commencing to make such deviation; and it shall be lawful for the owner of any lands prejudicially affected thereby, at any time before the commencement of the making of such deviation, to apply to the Board of Trade, after giving ten days notice to the company to decide whether, having regard to the interests of such applicants, such proposed deviation is proper to be made; and it shall be lawful for the Board of Trade, if they think fit, to decide such question accordingly, and by their certificate in writing, either to disallow the making of such deviation or to authorize the making thereof, either simply or with any such modification as shall seem proper to the Board of Trade; and after any such certificate shall have been given by the Board of Trade, it shall not be lawful for the company to make such deviation except in conformity with such certificate (o).

Public notice to be given previous to making greater deviations.

Power to the owners of adjoining lands to appeal to the Board of Trade against such deviations.

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(o) A railway company were building an embankment more than five feet above the level, according to the 11th and 12th sections of this act. They had not given the notice required by the 12th section, but had obtained the consent required by the 11th. On a motion for an injunction to restrain the company from proceeding with the deviation from the level of the railway beyond the limits of 5 feet mentioned in this act, the court put the company upon terms to take the opinion of the Board of Trade, submitting to such order as the Court of Chancery should thereafter make, otherwise an injunction would be granted to restrain the company from proceeding with the embankment. (*Pearce v. Wycomb Railw. Co.*, 1 Drew. 244; 19 Eng. Law & Eq. 122.)

8 & 9 Vict.
20.

Sect. 13

Arches, tunnels &c. to be made as marked on deposited plans

Limiting deviations from gradients, curves, &c.

XIII. Where in any place it is intended to carry the railway on an arch or arches or other viaduct, as marked on the said plan or section the same shall be made accordingly; and where a tunnel is marked on the said plan or section as intended to be made at any place, the same shall be made accordingly, unless the owners, lessees, and occupiers of the land in which such tunnel is intended to be made shall consent that the same shall not be so made.

XIV It shall not be lawful for the company to deviate from or alter the gradients, curves, tunnels, or other engineering works (*p*) described in the said plan or section, except within the following limits, and under the following conditions; (that is to say),

Subject to the above provisions in regard to altering levels, it shall be lawful for the company to diminish the inclination or gradients of the railway to any extent, and to increase the said inclination or gradients as follows; (that is to say,) in gradients of an inclination not exceeding one in a hundred, to any extent not exceeding ten feet per mile, or to any further extent which shall be certified *by the Board of Trade to be consistent with the public safety, and not prejudicial to the public interest; and in gradients of or exceeding the inclination of one in a hundred, to any extent not exceeding three feet per mile, or to any further extent which shall be so certified by the Board of Trade as aforesaid (*q*):

It shall be lawful for the company to diminish the radius of any curve described in the said plan to any extent, which shall leave a radius of not less than half a mile, or to any further extent authorized by such certificate as aforesaid from the Board of Trade:

It shall be lawful for the company to make a tunnel, not marked on the said plan or section, instead of a cutting, or a viaduct instead of a solid embankment, if authorized by such certificate as aforesaid from the Board of Trade.

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(*p*) The words of this section were relied upon to show that there shall be no departure from the engineering works, and that these engineering works mean all the works which might become necessary in consequence of the making of the railway. But the court held it to be clear that these other

engineering works mentioned in this section mean other engineering work *ejusdem generis*, that is, other engineering works in the formation of the railway itself. (*Beardmer v. London and North Western Railw. Co.*, 5 Railw. C. 728; 1 Mac. & G. 112; 1 Hall & T. 161.)

8 & 9 VICT
c. 20
Sect. 15.

(q) *Ante*. sect. 12. p. 425.

XV. It shall be lawful for the company to deviate from the line delineated on the plans so deposited, provided that no such deviation shall extend to a greater distance than the limits of deviation delineated upon the said plans (r), nor to a greater extent in passing through a town, village, or lands continuously built upon than ten yards, or elsewhere to a greater extent than one hundred yards from the said line, and that the railway by means of such deviation be not made to extend into the lands of any person, whether owner, lessee, or occupier, whose name is not mentioned in the books of reference, without the previous consent in writing of such person, unless the name of such person shall have been omitted by mistake, and the fact that such omission proceeded from mistake shall have been certified in manner herein, (s) or in the special act provided for in cases of unintentional errors in the said books of reference.

Lateral deviations

(r) Under the 13th, 14th, and 15th sections of this act, where a tunnel is marked on the deposited plans of a railway, the line cannot be deviated within the limits of deviation, but the tunnel must be on the place indicated, unless there be an agreement or a provision in the special act to the contrary. But if the railway be wrongfully deviated where a tunnel is laid down, the railway company is not bound to make a tunnel on the line so deviated. (*Little v. Newport, Abergavenny and Hereford Railw. Co.*, 22 Law J. C. P. 39; 17 Jur. 209). *Maule, J.*, in giving judgment observed, "this act does not profess to make provisions applicable to the construction of all railways, in all respects, and upon every occasion. That would have been impossible, because railways, not belonging to a class of immutable things, but each having its own local peculiarities, must require their own individual privileges, and there must necessarily be provisions arising out of their local circumstances which could

What deviations allowable.

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not by possibility be made the subject of general provision. But notwithstanding that this is so, there are many matters relating to railways which are common to almost all railways ; and with respect to such matters this act of parliament would seem to be a salutary one in two respects. It shortens the length of the special acts for particular railways, and in furnishing, by way of reference, well understood provisions applicable to such cases, it lessens the trouble and expense of preparing these acts of parliament, and by conferring, as far as it can be applied, uniformity on them, it makes the decisions which have taken place in respect of one railway applicable with respect to another ; which is a great advantage, as it makes the law clear and intelligible. Otherwise, if special provisions were to be carried into effect by special words in each act, distinctions would be taken, and questions would arise upon each act of parliament whether the words were absolutely equivalent, not being quite the same in this act and in others. Questions of that kind are very unsatisfactory and injurious to the administration of justice, and they are prevented by the scope and policy of this act of parliament, which is a beneficial one. The effect of that scope is to leave things fit for local provision to local provision. Now with respect to tunnels and engineering works generally, it is quite evident that they are fit for such provision, and any variation and alteration in them that may be required for what is proposed and shown to the public, is a matter almost impossible to be determined by general regulation, and is eminently fit to be the subject of local provisions in the special act of parliament." (*Ib.* 42, 43.) The expression "deviation" in this section is to be taken with reference to the line of railway only, that is, that the line of railway actually laid down shall not deviate more than one hundred yards from the line laid down, and delineated in the parliamentary plans, the *medium filum viæ* of each being the commencement and termination in measuring those one hundred yards. (*Doe d. Armistead v. North Staffordshire Railw. Co.*, 16 Q. B. 537 ; 20 Law J. Q. B. 249, *ante*, See *Doe d. Payne v. Bristol and Exeter Railw. Co.*, 6

*Mec. & W. 320; *Crawford v. Chester and Holyhead Railw. Co.*, 11 Jur. 917; *ante*, p. 424.)

8 & 9 VICT.
c. 20.

Sect. 15.

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An agreement was made between a landowner and a railway company, that the former should not oppose a projected railway, on condition that it should be referred to arbitration for (*inter alia*) defining the line of approach to his premises from a turnpike road, which it was proposed to divert. After the award indicating such approach had been made, it became expedient for the company further to divert the turnpike road, but within the limits of deviation, and consequently necessary to alter the line of approach to the landowners premises: it was held, that the company were not precluded from making such alteration. (*Wood v. North Staffordshire Railw. Co.*, 1 Mac. & G. 268; 1 Hall & T. 611; 6 Railw. C. 25.)

(s) *Ante*, sect. 7, p. 419.

XVI. Subject to the provisions and restrictions in this and the special act, and any act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works (*t*) connected therewith, hereinafter mentioned, to execute any of the following works: (that is to say,)

Works to be
executed.

They may make or construct, in, upon, across, under, or over any lands, or any streets, hills, valleys, roads, railroads, or tramroads, rivers (*u*), canals, brooks, streams, or other waters within the lands described in the said plans, or mentioned in the said books of reference or any correction thereof, such temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings, and fences as they think proper; Inclined plans, &c.

They may alter the course of any rivers not navigable, brooks, streams, or watercourses, and of any branches of navigable rivers, such branches not being themselves navigable, within such lands, for the purpose of constructing and maintaining tunnels, bridges, passages, or other works over or under the same, and divert or alter, as well temporarily as permanently, the course of any such rivers or streams of water, roads, streets, or ways, or raise or sink the level of any such rivers or Alteration of course of rivers, &c.

8 & 9 Vict. c. 20.	streams, roads, streets, or ways, in order the more conveniently to carry the same over or under or by the side of the railway (<i>v</i>), as they may think proper ;
Sect. 16	
Drains, &c. [*430]	They may make drains or conduits into, through, *or under any lands adjoining the railway, for the purpose of conveying water from or to the railway ;
Warehouses. &c.	They may erect and construct such houses, warehouses, offices, and other buildings, yards, stations, wharfs, engines, machinery, apparatus, and other works and conveniences as they think proper ;
Alterations and repairs.	They may from time to time alter, repair, or discontinue the before mentioned works or any of them, and substitute others in their stead ; and
General power.	They may do all other acts necessary for making, maintaining, altering, or repairing, and using the railway ;
Proviso as to damages.	Provided always that in the exercise of the powers by this or the special act granted, the company shall do as little damage as can be, and shall make full satisfaction in manner herein and in the special act, and any act incorporated therewith, provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers (1) (<i>x</i>).

(*t*) See *post*, s. 68.

First part of
this section
includes navigable
rivers.

(*u*) The word "rivers" is here used without any qualification, and would seem to include navigable rivers as well as rivers not navigable ; especially as the word "roads" here also used plainly includes highways along which the public have full as extensive a right of passage as they have along navigable rivers. (*Abraham v. Great Northern Railw. Co.*, 16 Q. B. 597.)

In an action on the case against a railway company for constructing a portion of their works upon a part of the bed of the navigable river Ouse, so as to prevent its flowing in its usual and accustomed channel, and to hinder the plaintiffs from passing and navigating their barges as they otherwise might and would have done ; the defendants pleaded that they had acted under their special act, the Lands Clauses Consolidation Act, and this act ; that plans and sections and books of reference had been deposited with the clerk of the

peace; and that, subject to the provisions in the above acts, ^{8 & 9 Vict. c. 20.} the defendants were empowered to construct their railway ^{Sect. 16.} in the line and upon the lands delineated and described in the said plans and books of reference; that the said part of the river was in the line and among the lands so delineated and described; and that the defendants did, for the purpose, and under the powers mentioned in the said acts, construct a part of their railway upon the bed of the said river, the same being necessary for the purpose of making and maintaining the said railway, as they lawfully might, &c. Replication de injuria: it was held, that the defendants by their plea were not required to prove that they had taken all the parliamentary steps necessary to vest in them the *ownership in the bed of the part of the river in question, as [*431] in the ordinary case of lands purchased. (*Abraham v. Great Northern Railw. Co.*, 15 Jur. 855; 20 L. J. Q. B. 322; 16 Q. B. 586.) It was held also, on motion for judgment non obstante verdicto, 1st, as against the plaintiffs, who had no interest in the soil of the bed of the river, it was not necessary for the defendants to aver and prove that such preliminary steps had been taken; 2dly, that the first clause in this section applies to navigable rivers as well as rivers not navigable, and empowered the defendants to do the act complained of. (*Ib.*)

(v.) This section gives a distinct power to carry a road underneath the railway. (*Braynton v. London and North Western Railw. Co.*, 4 Railw. C. 461.) (1)

(1) The provision in this section of the act, that in the exercise of their powers the Company shall do as little damage as may be, ^{Proviso as to damages.} &c, applies only to cases of damage to individuals, for which compensation may be made and does not control the enactment in section 50, as to the ascent of bridges over their line. (*Regina v. The East and West India Docks and Birmingham Junction Railw. Co.*, 22 Eng. Law and Eq. 113.)

(x) All land authorized to be taken as necessary in the terms of the act, for the purpose of making and maintaining the railway and works, is liable to be so taken, whether ne- ^{What lands may be taken.}

8 & 9 VICT.
c. 20.

Sect. 16.

cessary for the actual line of railway, or for stations or other conveniences necessary for the working of the railway, as in forming or enlarging a station, and in forming places for carriages to collect and wait till the trains are ready to start: it was so held, where the piece of land sought to be taken by the company was described in the map, plan and book of reference deposited with the clerk of the peace; and the special act, after describing the line of railway, authorized the company to make and maintain the railway and works thereby authorized, in the line and in the manner after provided; and after reciting the deposit of the plan, section, and books of reference, authorized the company to make and maintain the railway and works in the line and upon the lands delineated upon the said plans, and described in the said book of reference, and to enter upon take and use such of the said lands as shall be necessary for such purpose. (*Cotherv. Midland Railw. Co.*, 2 Phill. C. C. 469; 5 Railw. C. 187; Law J. 1848, Ch. 235.) Lord *Cottenham*, C., observed, "the question between these parties is very simple. The piece of land sought to be taken from the plaintiff by the company is described in the map, plan and book of reference deposited with the clerk of the peace; and the act of the company, after describing the line of railway authorizes the company to make and maintain the railway and works thereby authorized in the line and in the manner after provided; and after reciting the deposit of the plan, section and books of reference, authorizes the company to make and maintain the railway and works in and upon the lands delineated upon the said plans, and described in the said book of reference, and to enter upon, take and use such of the said lands as shall be necessary for such purpose. The plaintiffs do not dispute the right of the defendants to take so much of this piece of land as may be required for forming the line of railway, but deny their right to take any part which exceeds what is wanted for that purpose, although required by the company for the purposes of the railway, in forming or enlarging a station, and in forming places for carriages to collect and wait till the trains are ready to start, no part of which

they contend is authorized by the act ; and that is the whole question, which must be decided by the words of the act, with the interpretation of such words either in the interpretation clause or by the provisions of the act, or of the Railways Clauses Consolidation Act." (*Cotter v. Midland Railw. Co.*, 2 Phill. C. C. 469 ; 5 Railw. C. 193.)

8 & 9 VICT.
c. 20.
Sect. 16.

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Under this section a railway company, empowered by a special act, incorporating the provisions of the general act, to construct "a railway and works" within certain limits as to space and time, may, within such limits, without the consent of the owner, take the land for the purpose of constructing the various works mentioned in this section, although such works be not *necessary*, but only *convenient* for the purposes of the company. (*Sadd v. Maldon, Witham and Braintree Railw. Co.*, 6 Exch. 143 ; 20 L. J. Exch. 102 ; 6 Railw. C. 779.)

Where, in consequence of a company raising the level of their railway within the limits of a vertical deviation, it became necessary to raise the height of a bridge over which a road was to be carried : it was held, there was no restriction as to the powers of the company to alter the levels of the approaches to the bridge, provided the land to be affected was included in the plans and sections deposited, or mentioned in the books of reference, and that full satisfaction was made to all parties interested for the damage sustained. (*Beardmer v. London and North Western Railw. Co.*, 1 Mac. & G. 112 ; 1 Hall & T. 161 ; 13 Jur. 327 ; 18 L. J. Ch. 432 ; 5 Railw. C. 728.) The 14th section of this act is to be construed as referable to the line of railway alone, whereas this section comprehends all collateral works, therein called accommodation works, which may be necessary in consequence of the formation of the railway itself. (*Ib.*)

In an action of trespass for breaking the plaintiff's close and cutting a tunnel through it, the defendants justified under a local act of parliament by which they were incorporated and empowered to make a certain railway, and also under the acts 8 & 9 Vict. cc. 18 and 20, averring that the close in question was a public highway, and delineated in their plan and book of reference, &c., as part of the lands through

Company to
pay compensation before
entry on
land.

8 & 9 VICT.
c. 20.
Sect. 16.

which the intended railway was to pass, &c., to which the plaintiff replied that the close in question was required to be purchased and permanently used for the purpose of the railway; and that he being entitled to the soil thereof, subject to a public right of way over the same, the defendants entered and made the tunnel without his consent, and without giving him notice to sell and convey the same and take it for the purpose of permanently using it for the purpose of the railway: it was held, first, that it must be taken on these pleadings, that the tunnel was made with a view to its permanently forming part of the railway; and, secondly, that the defendants were not justified under either of the above statutes in having entered on the land through which the permanent tunnel was to pass, without first giving compensation *to the owner of it. *Pollock*, C. B. said, "If the company made a permanent tunnel for the railway to pass through, by virtue of the powers given by this section, they must do so by the express enactment in the 6th section, subject to the provisions and restrictions in the Lands Clauses Consolidation Act, 1845; and one of those restrictions is, that, whether they purchase the land itself or permanently occupy it, they must pay the compensation before entry, so that whether the defendants acted under the first or second act, the defence was insufficient on the same ground—that they had not before entry paid the compensation due to the owner of the land through which the permanent tunnel passed." (*Ramsden v. Manchester Railw. Co.*, 12 Jur. 293; 5 Railw. C. 552; 1 Exch. 723.)

The South Wales Railway Company having power to cross the L. Railway, included in their deposited plans and book of reference certain land on which the L. Railway was constructed, and gave notice to the L. Company that they required to purchase such land for the 'purposes' of their railway. The South Wales Railway Company had no power to purchase, nor had the L. Company power to sell, any part of their actual line: it was held, that a mandamus could not be sustained requiring the South Wales Railway Company to issue their warrant to the Sheriff to summon a jury to assess

compensation for the purchase of the land on which the L. 8 & 9 Viet.
line was constructed. (*Reg. v. South Wales Railw. Co.*,
6 Railw. C. 489.) c. 20.
Sect. 16.

(x) If railway companies, in carrying on their works, do more damage than the necessity of the case requires, the Court of Chancery will restrain them by injunction. (*Manser v. Northern and Eastern Counties Railw. Co.*, 2 Railw. C. 391 ; *Agar v. Regent's Canal Co.*, Coop. C. C. 77.)

By local acts of parliament, certain paving commissioners of the parish of C. were empowered to remove obstructions from houses and buildings abutting near any streets, which, in their judgment, should obstruct the circulation of light or air, or be inconvenient to passengers. An act of parliament, establishing the Northern and Eastern Railway Company, empowered them to construct arches over the railway, or other works, streets, &c., and upon the railway, or any lands adjoining or near thereto, to erect stations. By another act, amending the former, the company were empowered to provide a station and depot near the London terminus of the Eastern Counties Railway ; and it was enacted, that all the " clauses, powers, provisions, directions, regulations," &c., contained in the former act should apply to the purchase of land and buildings for the railway, and also for the station. It was also enacted, " that nothing in that act should extend to prejudice, derogate from, &c., the privileges of any parish over which the said railroad should pass, under local acts of parliament." It was held, that the Northern and Eastern Railway Company were entitled, if it was necessary or reasonably convenient for the construction of a station and proper warehouses, to construct and *make coverings or buildings by arches or otherwise, over the public streets mentioned in the case, in like manner as they were entitled to do for the construction of the railway itself, and that by their last act of parliament they were expressly authorized to construct such station and warehouses at or near High Street, Shore-ditch. (*Att.-Gen. v. Eastern Counties Railw. Co.*, Law J. 1843, Exch. 106 ; 10 Mee. & W. 263 ; 2 Railw. C. 283.)

[*434]

8 & 9 Vict.
c. 20.

Sect. 17.

Works below high-water mark not to be executed without the consent of the lords of the admiralty.

XVII. It shall not be lawful for the company to construct on the shore of the sea, or of any creek, bay, arm of the sea, or navigable river communicating therewith, where and so far up the same as the tide flows and reflows, any work, or to construct any railway or bridge across any creek, bay, arm of the sea, or navigable river, where and so far up the same as the tide flows and reflows, without the previous consent of her majesty, her heirs and successors, to be signified in writing under the hands of two of the commissioners of her majesty's woods, forests, land revenues, works and buildings, and of the lord high admiral of the united kingdom of Great Britain and Ireland, or the commissioners for executing the office of lord high admiral aforesaid for the time being, to be signified in writing under the hand of the secretary of the admiralty, and then only according to such plan, and under such restrictions and regulations as the said commissioners of her majesty's woods, forests, land revenues, works and buildings, or the said lord high admiral, or the said commissioners may approve of, such approval being signified as last aforesaid; and where any such work, railway, or bridge shall have been constructed, it shall not be lawful for the company at any time to alter or extend the same without obtaining, previously to making any such alteration or extension, the like consents or approvals; and if any such work, railway, or bridge shall be commenced or completed contrary to the provisions of this act, it shall be lawful for the said commissioners of her majesty's woods, forests, land revenues, works, and buildings, or the said lord high admiral, or the said commissioners for executing the office of lord high admiral, to abate and remove the same, and to restore the site thereof to its former condition, at the cost and charge of the company: and the amount thereof may be recovered in the same manner as a penalty is recoverable against the company.

Alteration of
water and
gas pipes &c.

[*435]

XVIII. It shall be lawful for the company, for the purpose of constructing the railway, to raise, sink, or *otherwise alter the position of any of the watercourses, water pipes, or gas pipes belonging to any of the houses adjoining or near to the railway, and also the mains and other pipes laid down by any company or society who may furnish the inhabitants of such houses or places with water or gas, and also to remove all other obstructions to such construction, so as the same respectively be done with as little detriment and inconvenience

to such company, society, or inhabitants as the circumstances will admit, and be done under the superintendence of the company to which such water pipes or gas pipes belong, and of the several commissioners or trustees, or persons having control of the pavements, sewers, roads, streets, highways, lanes and other public passages and places within the parish or district where such mains, pipes or obstructions shall be situate, or of their surveyor, if they or he think fit to attend, after receiving not less than 48 hours notice for that purpose.

8 & 9 VICT.
c. 20.
Sect. 19.

XIX. Provided always, that it shall not be lawful for the company to remove or displace any of the mains or pipes, (other than private service pipes), syphons, plugs, or other works belonging to any such company or society, or to do anything to impede the passage of water or gas into or through such mains or pipes, until good and sufficient mains or pipes, syphons, plugs, and all other works necessary or proper for continuing the supply of water or gas as sufficiently as the same was supplied by the mains or pipes proposed to be removed or displaced, shall at the expense of the company, have been first made and laid down in lieu thereof, and be ready for use, in a position as little varying from that of the pipes or mains proposed to be removed or displaced as may be consistent with the construction of the railway, and to the satisfaction of the surveyor or engineer of such water or gas company or society, or, in case of disagreement between such surveyor or engineer and the company, as a justice shall direct.

Company not to disturb pipes until they have laid down others.

XX. It shall not be lawful for the company to lay down any such pipes contrary to the regulations of any act of parliament relating to such water or gas company or society, or to cause any road to be lowered for the purpose of the railway, without leaving a covering of not less than eighteen inches from the surface of the road over such mains or pipes.

Pipes not to be laid contrary to any act, and 18 inches surface road to be retained.

XXI. The company shall make good all damage done to the property of the water or gas company or *society by the disturbance thereof, and shall make full compensation to all parties for any loss or damage which they may sustain by reason of any interference with the mains, pipes or works of such water or gas company or society, or with the private service pipes of any person supplied by them with water.

Company to make good all damage [436]

XXII. If it shall be necessary to construct the railway or any of the works over any mains or pipes of any such water or gas company or society, the company shall at their

When railway crosses pipes, company to make a culvert.

8 & 9 Vict. own expense, construct and maintain a good and sufficient
c. 20. culvert over such main or pipe, so as to leave the same acces-
Sect. 22. sable for the purpose of repairs.

Penalty for
obstructing
supply of
gas or water.

XXIII. If by any such operations as aforesaid the company shall interrupt the supply of any water or gas they shall forfeit twenty pounds for every day that such supply shall be so interrupted, and such penalty shall be appropriated to the benefit of the poor of the parish in which such obstruction shall occur, in such manner as the overseers of the poor of the parish shall direct.

Penalty for
obstructing
construction
of railway.

XXIV. If any person wilfully obstruct any person acting under the authority of the company in the lawful exercise of their power, in setting out the line of the railway, or pull up or remove any poles or stakes driven into the ground for the purpose of so setting out the line of the railway, or deface or destroy any marks made for the same purpose, he shall forfeit a sum not exceeding five pounds for every such offence.

Drainage of Lands in Ireland.

1 & 2 Will.
4, c. 57.

And whereas there are large tracts of land in Ireland subject to flood and injury by water, and the rivers, streams, and watercourses are in many places obstructed by shoals, insufficient bridges, culverts, weirs, and other works, whereby the waters thereof are elevated above their natural level : And whereas an act of parliament was passed in the second year of the reign of his late majesty king William the Fourth entitled "An Act to empower landed Proprietors in Ireland to sink, embank, and remove Obstructions in Rivers : " And whereas another act was passed in the sixth year of the reign of her present majesty, entitled "An Act to promote the Drainage of Lands, and Improvement of Navigation and Water Power in connection with such Drainage, in Ireland ; " and by the said last-mentioned act public commissioners were appointed to carry the said last recited act into execution :
[*437] *And whereas it is essential, for carrying into effect the purposes of the said acts, and for the improvement of agriculture, that ample provision be made in all railway works in Ireland for the free and uninterrupted passage of the waters at such level as will be sufficient not only for the present but all future discharge of the waters from lands crossed by or

being on either side of such works, and that the bridges of railways crossing all watercourses, rivers, lakes, or estuaries which are or hereafter may be made navigable shall be so constructed as to admit of the commodious navigation of the same: therefore with respect to the provision to be made for the drainage of land in Ireland which may be crossed by the railway, and for the protection of the navigation connected therewith, be it enacted as follows:

8 & 9 Vict.
c. 20.
Sect. 25.

XXV. If the special act shall authorize the construction of a railway in Ireland, the company shall and they are hereby required, from time to time, before proceeding to construct any portion of the railway, to submit to the commissioners acting in execution of the said act of the sixth year of her present majesty, or any act amending the same, such plans, sections, and surveys as shall be necessary to enable the said commissioners to decide upon the number and adequacy of the waterways of all bridges, culverts, tunnels, watercourses, and other works across the line of such portion as aforesaid of the railway, for the free and uninterrupted discharge of the waters from all lands crossed by or lying on either side of or near the railway, at such level as shall in the opinion of the said commissioners be sufficient for the present and prospective drainage and improvement of such lands, and (in cases of rivers, lakes, estuaries, or watercourses, which are now or may be capable of being made navigable) upon the height and adequacy of all bridges and works crossing the same, for the commodious navigation thereof.

The company from time to time to submit to the drainage commissioners in Ireland plans, &c., of the portion of the railway which they are about to execute.

XXVI. The said commissioners shall and they are hereby required without any unnecessary delay, to investigate, by such means as to them shall seem fit, the adequacy of all such works for such purposes as aforesaid, and to decide and certify, by a writing under their hands, or the hands of any two of them, the number, situation, and least possible dimensions as to breadth, depth, and height of the several openings of such bridges, culverts, tunnels, or other works connected with such portion of the railway as aforesaid, *which shall be necessary for the passage of water, or for navigation under or across such railway; and it shall not be lawful for the company to proceed with the execution of any of the works connected with any portion of the railway without

Such commissioners to investigate and report on the works necessary for drainage.

[*438]

8 & 9 VICT.
c. 20.
Sect. 27.

having first obtained such a certificate as aforesaid respecting such portion of the railway under the hands of the said commissioners or any two of them, as aforesaid: nor shall the company be at liberty to deviate from such certificate in respect to such works, nor to execute the same otherwise than in conformity therewith, without the previous approbation in writing of the said commissioners.

Summary
application
to the Court
of Chancery
to enforce
the execution
of such
works.

XXVII. It shall be lawful for the said commissioners to apply by petition in a summary way to the Court of Chancery, complaining of any omission on the part of the company to submit such plans, sections and surveys to the said commissioners as aforesaid, or of the omission to construct any such bridge, culvert, tunnel, or other works for the passage of water, in such manner as shall be so certified by the said commissioners, and thereupon it shall be lawful for the said court to direct such works to be made or constructed by the company in such manner as shall be conformable to the certificate of the said commissioners, and to the said court shall seem necessary or proper, and to make from time to time such further or other order for restraining the company or any other persons from proceeding with any of the works connected with such portion of railway, except in conformity with the certificate of the said commissioners, and to issue any writ of injunction for the purpose aforesaid; and such court shall have power to award costs to be paid by such company or persons.

Saving of
the powers
of the drain-
age commis-
sioners.

XXVIII. Nothing in this or the special act shall extend or be construed to prejudice or affect the powers or authorities of the commissioners acting in execution of the said act of the said of the sixth year of her present majesty, but all such powers shall be in full force as to the formation of any cut, river, or watercourse across the railway, but such powers shall not be exercised so as to prevent or obstruct the working or using of the railway.

[*439]
The drainage
commission-
ers in Ire-
land to have
power to de-
cide questions
as to the ex-
ecution of
works or to
execute works

XXIX. And whereas it is expedient to encourage the establishment of manufactories to be worked by water power in Ireland; be it therefore enacted, that whenever it may be requisite for the formation of a watercourse for manufacturing purposes to construct an arch culvert, tunnel, or watercourse beneath or an aqueduct above any railway in Ireland, and that differences shall have arisen between the directors of such railway and the person interested in obtaining the

water power, either as to the manner in which such works shall be executed, or the amount of compensation which should be paid, it shall be lawful to refer the questions in issue to the commissioners acting under the said recited act of the fifth and sixth years of the reign of her majesty Queen Victoria, and their decision thereon shall be final and conclusive; and if the said commissioners shall be of opinion that the proposed works can be executed without injury to the railway, and if they shall think proper so to do, they may undertake the execution of so much of the said works as shall be in connection with such railway, at the expense of the parties for whose benefit the watercourse shall be made, with the same powers and authorities as are given by the said act for the execution of any works for drainage.

8 & 9 Vict.
c. 20.

Sect. 29.
for carrying
watercourses
across the
railway.

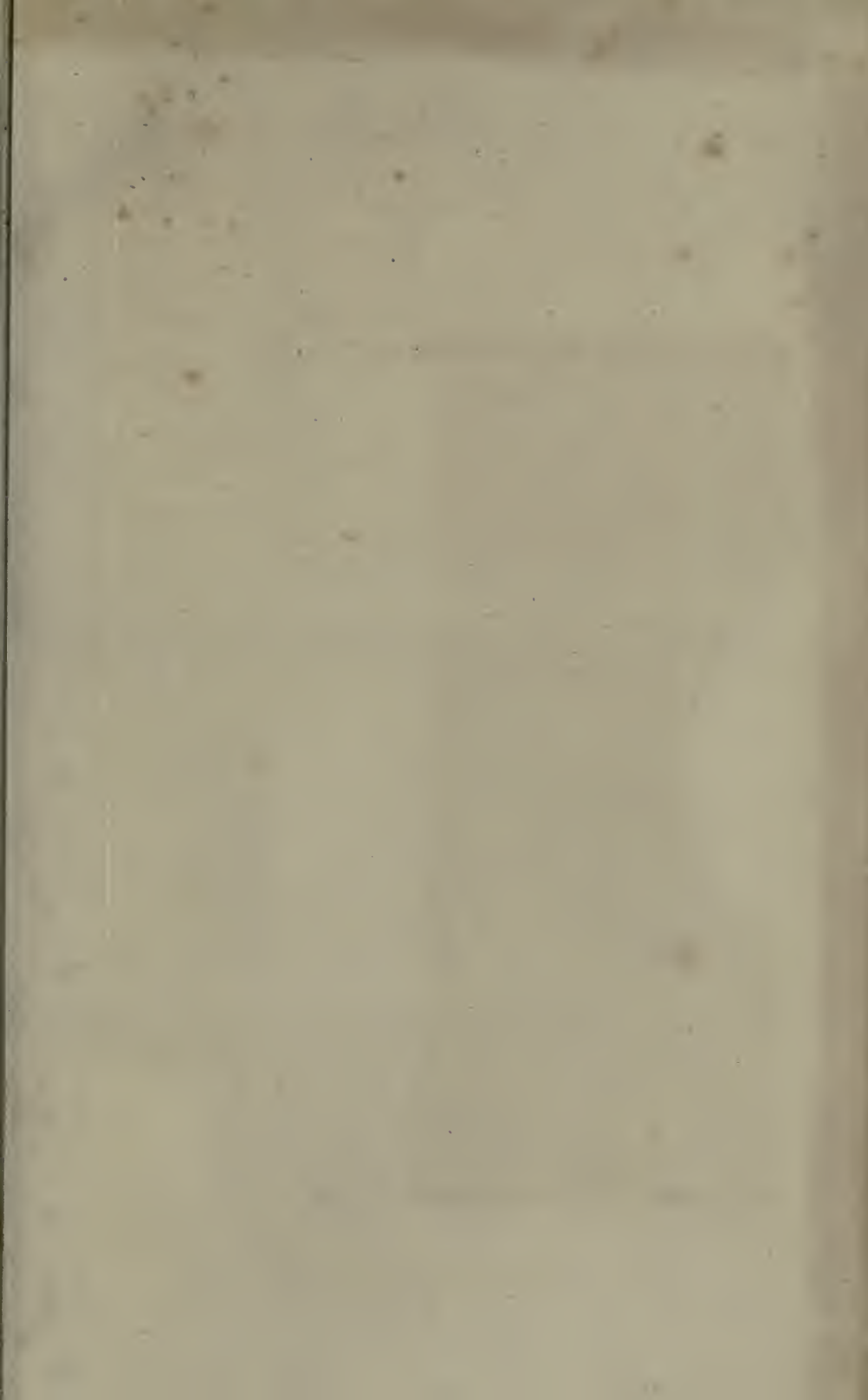
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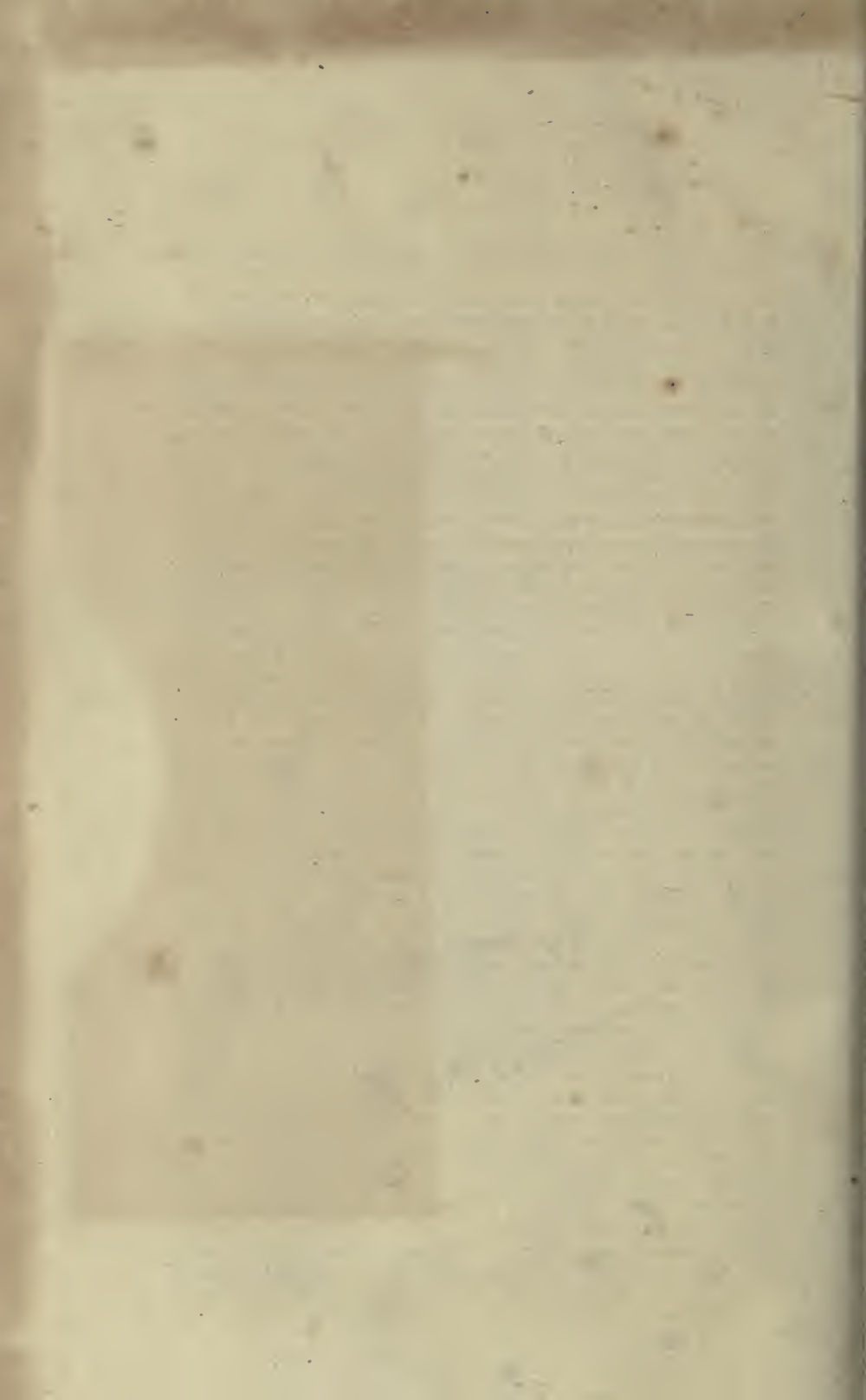
ADDENDUM.

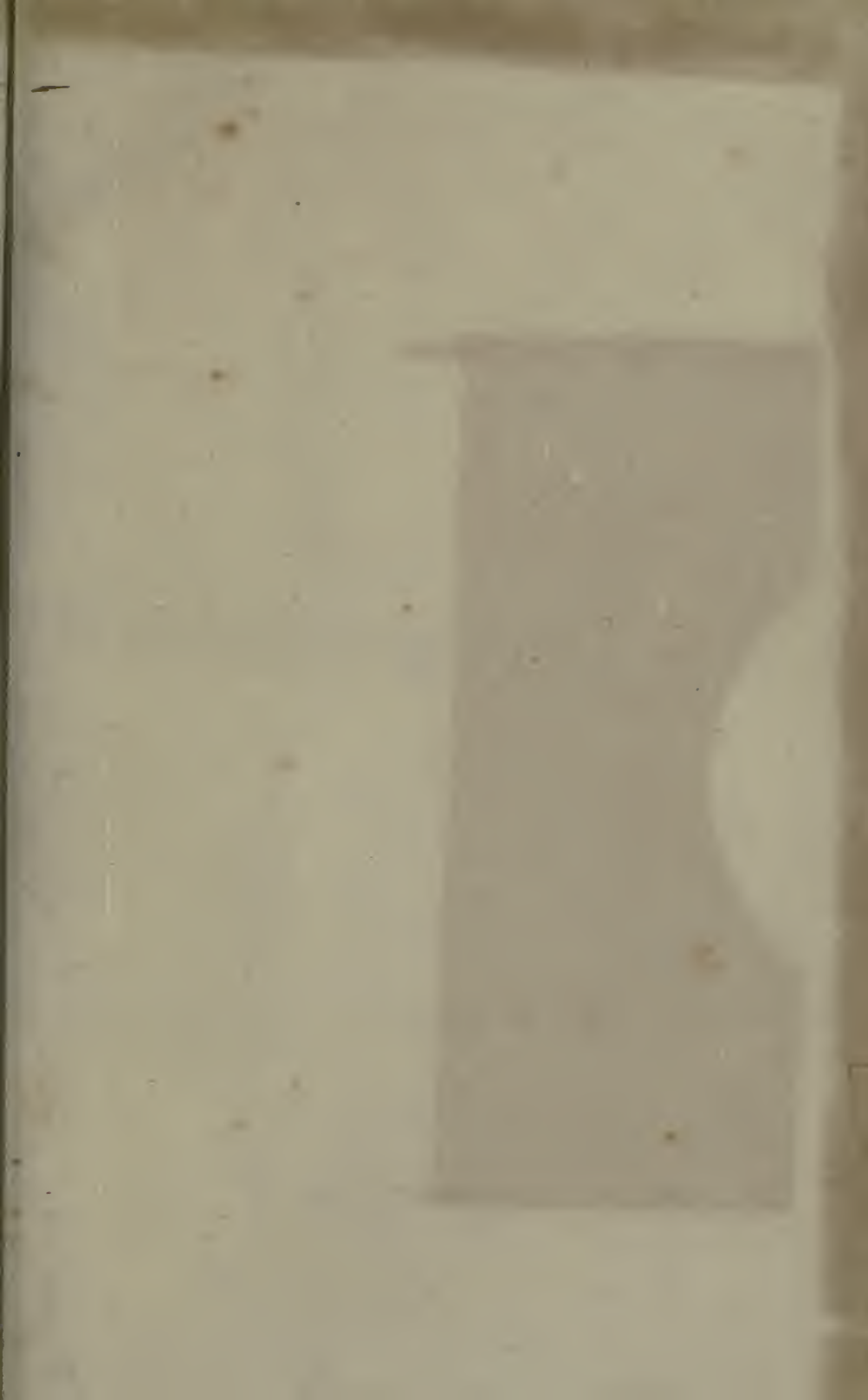
The following note was omitted in its proper place, p. 115.

Amalgama-
tion of Rail-
way Com-
panies.

A company for making a railway from Dublin to Mullingar was incorporated by an act of parliament passed in July, 1845, (8 & 9 Vict. c. 119,) under the name of "The Midland Great Western Railway Company of Ireland." Some of its directors provisionally registered another company for making a railway from Mullingar to Galway, to be called "The Galway and Mullingar Junction Railway Company." Three months afterwards this name was altered at the Registration Office to "The Midland Great Western Railway Company of Ireland (extension from Mullingar to Galway)." Most of the directors of the two companies were the same. L. applied for and received scrip certificates in the extension company, and paid deposits thereon, and received receipts headed with the altered name, and signed the shareholders' agreement and parliamentary contract. The Midland Great Western presented, in its own name and under its corporate seal, a petition to parliament for an act to make a railway from Mullingar to Galway, undertaking at its own expense, to make the railway. The act which was passed upon this petition, in July, 1846, (9 & 10 Vict. c. 224,) only gave authority to make the railway from Mullingar to Athlone, or but a part of the distance. The directors had power under the act to raise the necessary sums "by contributions among themselves or by the admission of other parties." The additional capital required for the extension, was directed to form "part of the general and original capital of the company;" and the provisions of the recited act. (that of 1845) were to extend to and be read with the new act. The expression, "The Company," in the new act, was declared to mean the Midland Great Western Company. In September, 1846, at a meeting of the directors of the Midland Great Western Company, a resolution was passed stating on what terms the holders of the extension scrip should be entitled to certificates in the joint company, and another resolution approving of and confirming those terms. At that meeting, the seal of the Midland Great Western Company was affixed to the shareholders' book, which, however, did not then contain the names of the shareholders in the extension line. The latter were added in March, 1847, when one of them that of the defendant, was inserted. Three calls were made; the first was dated previous to the insertion of the extension subscribers in the shareholders' book, the two others after that insertion. An action was brought for these calls:—Held, that the act did not amalgamate the two companies; and that even if the directors possessed a power of amalgamation, the resolution of September, 1846, was not an exercise of that power so as to render the defendant liable to an action for any one of the calls, at the suit of the Midland Great Western Company. (*The Midland Great Western Railw. Co. v. Leach*, 22, Eng. Law and Equity Rep. 45.)









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